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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDICES

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hearing en banc.

hearing en banc.

1978, June 9, 1989

2.A.10 (Ok1)

APPENDIX A

UNITED STATES of America

v.

William J. BURNS.

No. 88-3161.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 16, 1989.

Decided Jan. 12, 1990.

Defendant pled guilty to theft of government funds, making false claim against the Government, and income tax evasion and was sentenced by the United States District Court for the District of Columbia, Norma Holloway Johnson, J. Defendant appealed. The Court of Appeals, Mikva, Circuit Judge, held that: (1) there were valid reasons for departure from Sentencing Guidelines in that the income tax evasion was to conceal the other crimes, duration of the crimes extended over six years, in crimes resulted in disruption of government functions; (2) a sentence of 60 months, which was a 23-month departure, was not unreasonable; (3) trial court was not required to give notice of intent to depart from the Guidelines; but (4) it would be appropriate for prosecutors to modify plea bargain agreement language to make clear that bargain either contemplates trial judge exercising her enhancement powers or allows defendant to withdraw plea if trial judge contemplates enhancement.

Affirmed.

1. Criminal Law §1134(1), 1147

District court's determination of whether a certain factor was not adequately considered by Sentencing Commission in formulating the Guidelines, so that it may be basis for departure, is subject to plenary review, but once it is established that a factor is a legally permissible basis for departure, Court of Appeals gives broad deference to district court's judgment as to the appropriateness of considering the factor, and will uphold the departure so

long as it is reasonable. 18 U.S.C.A. §§ 3553(b), 3742(e)(4); U.S.S.G. § 5K2.0, p.s., 18 U.S.C.A.App.

2. Criminal Law §1208.6(4)

That tax evasion was engaged in an order to conceal embezzlement scheme provided basis for upward departure from Sentencing Guidelines; concealment of theft and false claims against the Government through income tax evasion was not a factor that had already been considered within the Guidelines under the adjustment for "more than minimal planning." U.S. S.G. §§ 2B1.1, 2F1.1, 5K2.9, p.s., 18 U.S.C. A.App.

3. Criminal Law §1208.6(4)

The prolonged and repetitive nature of crime involving theft of government funds and making false claim against the Government, in that there were 53 separate acts of theft over a six-year period, provided basis for upward departure from Sentencing Guidelines and was not subsumed under the "more than minimal planning" adjustment. U.S.S.G. § 1B1.1, comment. (n.1(f)), 18 U.S.C.A.App.

4. Criminal Law §1275

Upward departure from sentencing guidelines for theft of government funds and making false claim against the Government was justified on the basis of disruption of government functions, in that defendant diverted government resources and used federal mechanisms to perpetrate his crimes. U.S.S.G. §§ 5K2.0, p.s., 5K2.7, p.s., 18 U.S.C.A.App.

5. Criminal Law §1275

Sentence of 60 months, which was an upward departure of 23 months from the Sentencing Guidelines, for theft of government funds, making false claim against the Government and income tax evasion was not unreasonable given three departure reasons, in that the tax evasion was to conceal the other crimes, duration of the crime extended over six years, and disruption of government functions was involved. 18 U.S.C.A. §§ 287, 641, 3553(a, b); 26 U.S.C.A. § 7201; U.S.S.G. §§ 5K2.0, p.s., 5K2.7, p.s., 5K2.9, p.s., 18 U.S.C.A.App.

6. Criminal Law — 986.1

District court was not required to give defendant notice of intent to depart from Sentencing Guidelines. Fed.Rules Cr.Proc. Rules 32, 32(a)(1), 18 U.S.C.A.; U.S.S.G. §§ 6A1.3, comment., 6A1.3, p.s., 18 U.S.C. A.App.

7. Criminal Law — 273.1(2)

It would be appropriate for prosecutors to modify plea bargain agreement language to make clear that bargain either contemplates the trial judge exercising her enhancement powers, to depart from Guidelines suggested sentencing range, or allows defendant to withdraw his plea if trial judge contemplates enhancement.

Appeal from the United States District Court for the District of Columbia.

Maureen DelDuca, (appointed by this Court as co-counsel), with whom Steven H. Goidblatt, (appointed by the Court), was on the brief, for appellant.

J. Douglas Wilson, Atty., Dept. of Justice, with whom Jay B. Stephens, U.S. Atty., Washington, D.C., was on the brief for appellee.

Before MIKVA, SILBERMAN, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

This case requires us to rule on the validity of the trial judge's decision to depart from the sentence range contemplated in the Federal Sentencing Guidelines. The defendant, William J. Burns, pled guilty to theft of government funds, making a false claim against the government, and income tax evasion, crimes for which he expected to receive a sentence of 30 to 37 months in prison, pursuant to the applicable Guidelines range. Despite the agreement of the U.S. attorney to the 30-37 month range and the recommendation of Burns' probation officer that Burns receive a sentence within that range, the trial judge found three reasons for an upward departure and

sentenced Burns to 60 months in prison. Burns appeals his sentence, contending that the trial judge relied on impermissible grounds in enhancing his sentence and that the extent of departure was unreasonable. He also maintains that the Federal Rules of Criminal Procedure and the Guidelines require that he be given advance notice of the judge's intention to depart. Because we find that the trial judge relied on three legitimate grounds for her departure decision and that nothing in the law requires a trial judge to provide advance notice of her intention to depart from the Guidelines, we affirm. As we are troubled by the plea bargaining procedure used in this case, we suggest that future plea agreements explicitly address the possibility that the trial judge may depart from the Guidelines even if such a departure is not recommended by the government or the probation officer.

I. BACKGROUND

Burns was employed by the United States Agency for International Development ("AID" or "the agency") from 1967 until 1988. Beginning in February 1982, he used his position as a supervisor in the agency's Financial Management Section to authorize the payment of unused travel funds from the U.S. Treasury to Vincent Kaufman. However, the payments to Kaufman were really a front for diverting government funds to Burns' own pocket. From 1982 to 1988, Burns authorized the issuance of 53 checks totaling in excess of \$1,200,000. Burns' scheme was discovered after a routine security check revealed that he owned a \$400,000 house despite his annual salary of \$35,000. Prior to his arrest, but after the government became aware of his embezzlement activities, Burns authorized the issuance of two checks in the name of Vincent Kaufman; these checks formed the basis for the government's case against Burns on charges of making false claims against the government.

After his arrest, Burns and the government entered into an agreement whereby Burns agreed to plead guilty to theft of government funds in violation of 18 U.S.C.

§ 641, to the government and evasion of income tax in violation of 26 U.S.C. § 7201. Burns agreed to surrender all of his assets, except for some minor personal property, and to pay restitution to the government by surrendering 50 percent of all his future annual income over \$40,000 and 100 percent of all future annual income over \$70,000. He also agreed to cooperate fully with the government in its investigation of the matter. Under the agreement, both parties understood that Burns' plea would be covered by the Sentencing Guidelines and that a sentencing level of 19, Criminal History Category I (30-37 months) would apply to his case.

The government also argued that Burns' plea agreement was not recommended by the government or the probation officer.

I. BACKGROUND

Burns was employed by the United States Agency for International Development ("AID" or "the agency") from 1967 until 1988. Beginning in February 1982, he used his position as a supervisor in the agency's Financial Management Section to authorize the payment of unused travel funds from the U.S. Treasury to Vincent Kaufman. However, the payments to Kaufman were really a front for diverting government funds to Burns' own pocket. From 1982 to 1988, Burns authorized the issuance of 53 checks totaling in excess of \$1,200,000. Burns' scheme was discovered after a routine security check revealed that he owned a \$400,000 house despite his annual salary of \$35,000. Prior to his arrest, but after the government became aware of his embezzlement activities, Burns authorized the issuance of two checks in the name of Vincent Kaufman; these checks formed the basis for the government's case against Burns on charges of making false claims against the government.

II. ANALYSIS

The trial judge's decision to depart from the Guidelines is not recommended by the government or the probation officer.

BACKGROUND

Burns was employed by the United States Agency for International Development ("AID" or "the agency") from 1967 until 1988. Beginning in February 1982, he used his position as a supervisor in the agency's Financial Management Section to authorize the payment of unused travel funds from the U.S. Treasury to Vincent Kaufman. However, the payments to Kaufman were really a front for diverting government funds to Burns' own pocket. From 1982 to 1988, Burns authorized the issuance of 53 checks totaling in excess of \$1,200,000. Burns' scheme was discovered after a routine security check revealed that he owned a \$400,000 house despite his annual salary of \$35,000. Prior to his arrest, but after the government became aware of his embezzlement activities, Burns authorized the issuance of two checks in the name of Vincent Kaufman; these checks formed the basis for the government's case against Burns on charges of making false claims against the government.

After his arrest, Burns and the government entered into an agreement whereby Burns agreed to plead guilty to theft of government funds in violation of 18 U.S.C.

§ 641, making a false claim against the government in violation of 18 U.S.C. § 287, and evasion of income tax in violation of 26 U.S.C. § 7201. Burns agreed to surrender all of his assets, except for some minor personal property, and to pay restitution to the government by surrendering 50 percent of all his future annual income over \$40,000 and 100 percent of all future annual income over \$70,000. He also agreed to cooperate fully with the government in its investigation of the matter. Under the agreement, both parties understood that Burns' plea would be covered by the Sentencing Guidelines and that a sentencing level of 19, Criminal History Category I (30-37 months) would apply to his case.

The probation officer's presentence report also concluded that Burns' sentence would be within the 30-37 month range, and did not recommend that Burns be given a sentence in excess of that prescribed by the Guidelines. At the sentencing hearing, however, Judge Johnson concluded that in order to give Burns an appropriate sentence, the court had to depart from the Guidelines. She noted that according to 18 U.S.C. § 3553(b), the sentencing judge is entitled to depart from the Guidelines in light of aggravating or mitigating circumstances that were not adequately considered by the Sentencing Commission. The trial judge found three factors involved in Burns' case that were not adequately addressed by the Guidelines. First, she found that although the Guidelines permit adjustment for the amount of money stolen and the level of planning, they do not give sufficient weight to the duration of the crime. Because the defendant's fraudulent scheme persisted for six years and involved 53 separate instances, the judge concluded that departure from the Guidelines was warranted.

Additionally, while the Guidelines do contain a provision for departure from the Guidelines, the trial judge found that the defendant's systematic abuse of the government's process of paying legitimate vendors, in addition to violating the public trust, constituted a disruption of government functions. Since § 5K2.7 of the Guidelines permits departure when "the de-

fendant's conduct resulted in the significant disruption of a governmental function," the trial court found this to be a second reason for imposing an enhanced sentence.

Finally, as the Guidelines also permit departure if "the defendant committed the offense in order to facilitate or conceal the commission of another offense," the trial judge concluded that Burns' evasion of over \$400,000 in taxes allowed him to conceal his theft and false claims and accordingly justified an upward departure from the Guidelines.

II. ANALYSIS

A. Standard of Review

[1] The Sentencing Guidelines provide that a trial judge can depart from the Guidelines based on aggravating or mitigating circumstances which were not adequately considered by the Sentencing Commission in formulating the Guidelines. 18 U.S.C. § 3553(b). If a factor is one which the Commission has already considered, it must be "present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction." Guidelines § 5K2.0, ¶ 2. Determining whether a certain factor is an appropriate ground for enhancement of a sentence involves a question of statutory interpretation. To the extent that this requires us to decide whether the Commission adequately considered that particular factor, we subject the court's determinations to plenary review. *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.1989), cert. denied — U.S. —, 110 S.Ct. 177, 107 L.Ed.2d 133 (1989); see also *United States v. Burke*, 888 F.2d 862, 865 (D.C.Cir.1989). Once it has been established that a factor is a legally permissible basis for departure, we give broad deference to the district court's judgment as to the appropriateness of considering this factor, and we will uphold the departure so long as it is reasonable. 18 U.S.C. § 3742(e)(4). We will only reverse the factual findings that the trial court relied upon in its departure decision

only if they are clearly erroneous. *Diaz-Villafane*, 874 F.2d at 49.

B. Reasonableness of Departure

Burns maintains that the trial court erred in departing from the Guidelines. He contends that the concealment and duration factors upon which the trial judge relied in her departure decision had already been contemplated by the Sentencing Commission and thus could not form a separate basis for departure. Burns also argues that the trial court's finding that he significantly disrupted government functions was not supported by the record. He further contends that the degree of departure was unreasonable and that the trial court unfairly failed to give him notice of its intention to depart from the Guidelines. We dispose of each of Burns' arguments in turn.

1. Concealment

[2] Burns maintains that because the Guidelines allow upward adjustment for "more than minimal planning," Guidelines §§ 2B1.1 and 2F1.1, his concealment of his theft and false claims through income tax evasion were factors that had already been considered within the Guidelines and therefore could not provide the basis for departure. Burns contends that since his "more than minimal planning" was not extraordinary, departure was unwarranted.

The trial court's upward departure for concealment, which is permitted under § 5K2.9 of the Guidelines, applied to Burns' tax evasion, and not to the fact that he used other elaborate methods to conceal his crimes. Therefore, while the Guidelines discuss an adjustment for "more than minimal planning" for theft of government funds and false claims, this applies only to the planning of those offenses. Burns' evasion of taxes to conceal his embezzlement scheme constituted a separate basis for an upward departure, distinct from the fact that his activities were well planned. Since it is possible to be guilty of tax evasion without concealing other crimes, we conclude that the trial court's decision

to depart based on concealment was reasonable.

2. Duration

[3] Burns argues that duration is also a factor considered by the Commission under the "more than minimal planning" adjustment and therefore cannot provide separate ground for departure. He notes that the commentary to the Guidelines states that the "more than minimal planning" adjustment applies to "any case involving repeated acts over a period of time." Guidelines § 1B1.1, note 1(f). Therefore, since the Guidelines already accounted for the duration of his crime, and his theft was not highly unusual when compared to others, Burns contends that the departure decision was erroneous.

The trial court, however, specifically stated that her decision to enhance Burns' sentence was based not simply on planning but upon the prolonged and repetitive nature of Burns' crime. According to the Guidelines' commentary, "more than minimal planning means more planning than is typical for commission of the offense in simple form." Guidelines § 1B1.1, note 1(f). The court properly observed that in incorporating a "more than minimal planning" adjustment into the Guidelines, the Commission did not consider "the number of years and the amount of fraudulent transactions . . . executed" by a defendant. Burns' crime involved 53 separate acts of theft over a six-year period. The trial judge could reasonably have concluded that the duration of execution, then, warranted enhancement. We note that a defendant who persists in his criminal activity over a period of years may deserve a harsher sentence than a defendant whose crime was limited in duration because the former has arguably had more opportunities to renounce his illegal schemes. Accordingly, the trial court's finding that the duration of Burns' crime justified departure, was not dependent upon the amount of planning involved in the crime, and thus was not unreasonable.

3. Disruption of

[4] Burns argues that the record does not indicate any disruption beyond the disruption in the offense was erroneous. His policy statement of government "unless the circumstances will reflect the appropriate punishment for such interference." Guidelines § 5K2.7. Burns argues that because his crime went undetected for six years and the money he stole was a tiny fraction of AID's budget, his activities could not have caused a significant disruption of government functions.

The Guidelines contemplate departure for crimes which significantly disrupt the function of the government. We reject Burns' argument that this was not an appropriate case for such departure. The fact that Burns' crimes went undetected for so long does not indicate that his activities caused little disruption. Rather, the record indicates that he diverted government resources and used federal mechanisms to perpetrate his crimes. Such misuse of the government's vendor payment process is clearly disruptive; it diverts federal resources from legitimate to illegitimate recipients.

Although disruption of government functions is an inherent aspect of crimes such as bribery, the Commission's policy statement indicates that "when the conviction is theft . . . and that theft caused disruption of a government function, departure from the applicable guideline more readily would be appropriate." Guidelines § 5K2.0, ¶ 2. In this case, the trial judge found that Burns' misuse of his position resulted in a "disruption of government function" beyond that which naturally accompanies diversion of resources from legitimate to illegitimate recipients. Burns' manipulation of AID procurement apparatus required the unwitting assistance of many government personnel, who were diverted from their legitimate tasks by the demands of his scheme. The

concealment was

that duration was not supported by the record. He contends that the departure decision was erroneous. He notes that the Commission's policy statement regarding disruption of government functions indicates that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." Guidelines § 5K2.7. Burns argues that because his crime went undetected for six years and the money he stole was a tiny fraction of AID's budget, his activities could not have caused a significant disruption of government functions.

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3. Disruption of Government Functions

[4] Burns argues that because the record does not indicate that his activities caused any disruption of government functions beyond the disruption which is inherent in the offense, the departure decision was erroneous. He notes that the Commission's policy statement regarding disruption of government functions indicates that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." Guidelines § 5K2.7. Burns argues that because his crime went undetected for six years and the money he stole was a tiny fraction of AID's budget, his activities could not have caused a significant disruption of government functions.

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Burns relied upon clerks to prepare forms necessary to divert government funds, and that his checks to "Vincent Kaufman"—issued by the United States Treasury—required administrative resources: including time and personnel to process these checks. Burns' illegal use of AID's system of paying its vendors, then, can be readily distinguished from those crimes involving basic theft of government property, such as stealing government supplies. The trial judge's conclusion that Burns' entanglement of two federal departments in his plan constituted disruption of a government function cannot be deemed unreasonable.

4. Reasonableness of Departure

[5] Burns argues that the amount of departure—23 months, or 62 percent above the maximum sentence under the Guidelines—was unreasonable in light of the trial court's reasons for departure and the purposes behind the punishment. Burns contends that the 60-month sentence is greater than necessary to serve the purposes of retribution, deterrence, incapacitation, and rehabilitation that were contemplated by the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a). He notes that he has already lost all of his assets and that he must surrender a portion of all future earnings. Moreover, as he will never work for the government again, he asserts that excessive punishment is unnecessary to protect the public from his crimes. Finally, he argues that his financial skills will go to waste in prison and could better benefit society if he were released sooner.

The trial court is best situated to decide the length of the sentence and its finding should not be reversed unless it is arbitrary or capricious. *United States v. Juarez-Ortega*, 866 F.2d 747, 748 (5th Cir. 1989). We cannot conclude that the sentence of 60 months is unreasonable. The trial judge offered three specific and legitimate grounds for departure, and it is not the place of this court to second-guess her sentencing decision. See *United States v. Paberson*, 872 F.2d 597, 606-607 (5th Cir. 1989), cert. denied, — U.S. —, 110 S.Ct. 175, 107 L.Ed.2d 131 (1989).

C. Notice of Intention to Depart

[6] Burns maintains that the trial court erred by failing to give him an opportunity to comment on its intention to depart from the Guidelines. He notes that Federal Rule of Criminal Procedure 32(a)(1) requires the court to give both sides notice of the probation officer's presentence report, including any factors indicating that departure from the Guidelines would be appropriate. Furthermore, at the sentencing hearing, counsel must be given an opportunity "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Burns maintains that Rule 32(a)(1), when read in conjunction with Guidelines § 6A1.3, requiring that the trial court fairly resolve any disputed factor important to sentencing, requires the sentencing judge to notify the parties of her intention to depart and provide them with an opportunity to comment.

Burns' notice argument lacks merit because a requirement that the court inform the parties of its intention to depart is not contemplated by Rule 32. Such a requirement would constitute a radical deviation from past practice and would impose a cumbersome burden on trial judges. Since the defendant had an opportunity to address the court before sentencing during his allocution and has a right to appeal his sentence, he has not been harmed by the trial court's lack of notice.

Despite the contrary conclusions of certain circuits, see, e.g., *United States v. Nano-Para*, 877 F.2d 1409, 1415 (9th Cir. 1989); *United States v. Cervantes*, 878 F.2d 50, 55 (2d Cir.1989); *United States v. Otero*, 868 F.2d 1412, 1415 (5th Cir.1989), we do not see any language in Rule 32 or the commentary requiring the sentencing court to provide the parties with advance notice of its intention to depart from the Guidelines. Pre-Guidelines sentencing procedures never called for such notice of the judge's intention to deviate from a plea bargain or a probation officer's recommendation. This is not a case in which the court is going beyond the facts in the presentence report in deciding to depart

from the Guidelines. All of the facts formed the basis of Judge Johnson's decision were contained in the presentence report, and Burns could have challenged the factual findings if he had believed they were erroneous. Concededly, a defendant will have less incentive to challenge these facts if he expects a sentence within the Guideline range. Burns is not challenging the facts—his 53 separate instances of theft over a six-year period and tax evasion—which formed the basis of the trial judge's departure decision. His right to appeal preserves his ability to challenge the legal ground on which the departure decision rests.

Finally, because defense counsel and the defendant are allowed to address the court prior to sentencing, the defendant has been given an opportunity to persuade the trial judge why sentencing within the Guidelines is warranted. Although the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make his best case.

The Guidelines are relatively new and are only beginning to be tested. It is true, as Burns points out, that the Guidelines envision a more formalized sentencing process. Guidelines § 6A1.3, Commentary ¶ 1. However, without a more specific command from Congress or the Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines.

D. The Plea Bargaining Procedure

[7] Although we do not find merit in Burns' notice argument, we are troubled by the plea bargaining procedure used in this case. The plea agreement reached between Burns and the government specifically provided that if either the probation office or the trial court reached a calculation different from the 30 to 37 months that the parties had agreed on, the plea bargain would be null and void. However, the agreement did not mention what the

consequences would be if the judge decided to depart from the suggested sentencing range.

We note that the defendant has waived his right to face a trial. Whether he should be able to withdraw his guilty plea in light of the trial judge's decision to enhance his sentence is not at issue. Nonetheless, we are disturbed by the ambiguity in the language of the plea agreement regarding what should happen if the trial judge decided to depart from the suggested range. We realize that the Sentencing Guidelines are new to both prosecutors and defense attorneys and that such unforeseen situations may arise from time to time. We think it would be appropriate for prosecutors to modify the plea bargain agreement language to make clear that the bargain either contemplates the trial judge exercising her enhancement powers, or allows the defendant to withdraw his plea if the trial judge contemplates enhancement. If the language is left in its present vague form, a serious question could arise as to whether a defendant has reserved the power to withdraw a plea if the trial judge decides to depart from the sentencing range that the parties agreed upon.

Because the Guidelines are relatively new and are only beginning to be tested, it is true, as Burns points out, that the Guidelines envision a more formalized sentencing process. Guidelines § 6A1.3, Commentary ¶ 1. However, without a more specific command from Congress or the Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines.

d SERIES

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Finally, because defense counsel and the defendant are allowed to address the court prior to sentencing, the defendant has been given an opportunity to persuade the trial judge why sentencing within the Guidelines is warranted. Although the defendant might have made a stronger argument for himself if he had known that the judge was intending to depart from the Guidelines and the reasons for such a departure, we do not see any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make his best case. The Guidelines are relatively new and are only beginning to be tested. It is true, as Burns points out, that the Guidelines envision a more formalized sentencing process. Guidelines § 6A1.3, Commentary ¶ 1. However, without a more specific command from Congress or the Commission, we do not conclude that the process must include advance notice of the trial judge's decision to depart from the Guidelines.

e. Plea Bargaining Procedure

Although we do not find merit in Burns' notice argument, we are troubled by the plea bargaining procedure used in this case. The plea agreement reached between Burns and the government specifically provided that if either the probation office or the trial court reached a calculation different from the 30 to 37 months that the parties had agreed on, the plea bargain would be null and void. However, the agreement did not mention what the

COALITION FOR THE PRESERVATION OF HISPANIC BROADCASTING, v. F.C.C.

Case No. 88-1588, 88-1589 (D.C. Cir. 1990)

consequences were to be if the judge decided to depart from the suggested sentencing range.

We note that the defendant has waived his right to withdraw his guilty plea and face a trial. Therefore, the question as to whether he should be able to withdraw his guilty plea in light of the trial judge's decision to enhance his sentence is not at issue. Nonetheless, we are disturbed by the ambiguity in the language of the plea agreement regarding what should happen if the trial judge decided to depart from the suggested range. We realize that the Sentencing Guidelines are new to both prosecutors and defense attorneys and that such unforeseen situations may arise from time to time. We think it would be appropriate for prosecutors to modify the plea bargain agreement language to make clear that the bargain either contemplates the trial judge exercising her enhancement powers, or allows the defendant to withdraw his plea if the trial judge contemplates enhancement. If the language is left in its present vague form, a serious question could arise as to whether a defendant has reserved the power to withdraw a plea if the trial judge decides to depart from the sentencing range that the parties agreed upon.

III. CONCLUSION

Because the trial judge articulated three legitimate reasons why departure from the Guidelines was appropriate, her decision to impose a sentence in excess of the 30 to 37 month recommended range should not be disturbed. As the defendant has not been harmed by the trial court's failure to give him notice of its intention to depart from the Guidelines, and since such a notice requirement does not appear on the face of Rule 32 or within the Guidelines, we affirm.



COALITION FOR THE PRESERVATION OF HISPANIC BROADCASTING, et al, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, Respondent,

Univision Holdings, Inc., et al.,
Intervenors.

Nos. 87-1285, 87-1287, 87-1299, 88-1564,
88-1588 and 88-1596.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 11, 1989.

Decided Jan. 12, 1990.

Challenge was brought to orders of the Federal Communications Commission (FCC) which approved settlement agreement providing for grant of license renewal of applications for licensee subject to prompt transfer of licenses to holding company, denied petitions for acceptance of competing applications, and granted applications to transfer control of licenses to holding company. The Court of Appeals, Mikva, Circuit Judge, held that: (1) three companies which made unsuccessful attempts to become licensee for the stations at issue had standing as prospective competitors to challenge the FCC's approval of the settlement agreements; (2) FCC properly refused to accept competing applications; and (3) FCC violated its *Jefferson Radio* policy.

Remanded.

Stephen F. Williams, Circuit Judge, issued an opinion dissenting in part and concurring in part.

1. Telecommunications 7-121

Companies which made unsuccessful attempts to become licensee for Hispanic radio stations had standing to challenge settlement agreement approved by Federal Communications Commission which approved transfer of licenses to holding company; companies were prospective competi-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
vs. : Criminal No. 88-0302
WILLIAM J. BURNS :

FILED

MEMORANDUM ORDER

OCT 14 1988

JAMES F. DAVEY, Clerk

Defendant William J. Burns entered a plea of guilty to the following offenses: theft of government property, in violation of Title 18, U.S. Code, section 641 (1982); false claims against the government in violation of Title 18, U.S.C. Code, section 287 (1982); and tax evasion in violation of Title 26, U.S. Code, section 7201 (1982).

The Sentencing Guidelines are applicable to this defendant. Pursuant to the Guidelines, defendant may be sentenced to a prison term of 30 to 37 months. Under the appropriate circumstances, however, the Court may depart from the sentence imposed by the Guidelines. Title 18, U.S. Code, section 3553(b) (1982), authorizes a departure from the Sentencing Guidelines when the Court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines" In its policy statement, the U.S. Sentencing

Commission states that the presence of factors not adequately considered in the Guidelines may, in the discretion of the sentencing judge, warrant departure from the Guidelines. Moreover, the Court may depart from the Guidelines even though the reason for departure is listed elsewhere in the Guidelines if the Court determines that in light of unusual circumstances, the Guideline level attached to that factor is inadequate. Further, the Commission stated that the "controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing." United States Sentencing Commission, Sentencing Guidelines, § 5K2.0. Thus, the Guidelines expressly authorize the sentencing judge to consider circumstances at sentencing that may justify departure from the established Guidelines.

The Court finds at least three factors involved in the defendant's offenses which the Guidelines either fail to address or to consider adequately. First, the Court finds that the Guidelines, in considering the severity of the offenses, do not sufficiently weigh the duration of defendant's criminal activity. The Court recognizes that the statute of limitations on the crimes committed by defendant is only five years, but defendant has confessed to theft from the United States Government for over six years, from February 25, 1982, to May 26, 1988. Throughout the course of these six years, defendant caused fifty-three

different fraudulent checks to be issued by the United States Government. While the Guidelines permit the Court to consider the level of planning involved in the offense, and the amount of money stolen, the number of years and the amount of fraudulent transactions planned, schemed, and executed were not considered pursuant to the Guidelines. The Court finds it significant that the defendant persisted for over five years in perpetrating this criminal activity against the taxpayers of the United States Government. The failure of the Sentencing Guidelines to account for this is a ground for departure.

Moreover, while the Guidelines do take into consideration the fact that defendant violated the public trust in committing these crimes, the Court finds that there was more involved in defendant's acts of theft and false claims than a mere violation of public duties. Defendant abused a process relied upon by the government to pay those who perform important and legitimate services for the United States. In taking fraudulent advantage of this vital system of remuneration over such a lengthy period of time, plaintiff has disrupted the functions of the government in addition to violating the public trust.

In addition to violating the public trust, defendant totally violated his oath of employment by engaging in this protracted, devious conduct. A million, three hundred thousand dollars, if stolen at one time, would have been much easier to detect than the same amount of money stolen

over a lengthy period of time. In his particularly devious manner, defendant stole at a rate and in a manner which made detection very difficult.

The Sentencing Guidelines permit departure when the "defendant's conduct resulted in a significant disruption of a governmental function, [and] the court may increase the sentence above the authorized guideline range". Id. at § 5K2.7. The Court finds that defendant caused significant governmental disruption by stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate fraudulent instruments.

Finally, the Guidelines permit the Court to depart from the prescribed sentence if "the defendant committed the offense in order to facilitate or conceal the commission of another offense ...". Id. at § 5K2.9. In this case, as stated in Count III, the defendant failed to report the stolen income for calendar years 1982-1987, resulting in a tax obligation of almost half a million dollars. By continually evading the payment of his tax liability, the defendant concealed the crimes of theft and false claims. Certainly, if this concealment had not taken place, defendant's crimes would have been discovered much earlier.

For these reasons, the Court finds that several important elements of the crimes committed by defendant are not considered fully by the Sentencing Guidelines, thus warranting departure from its prescription. This being the

case, the Court relies upon its own judgment and experience and finds that the range of thirty to thirty-seven months for the offenses committed by defendant is insufficient and does not reflect the magnitude of defendant's criminal conduct. The Court, therefore, increases the offense level from nineteen to twenty four which provides a sentencing range of fifty-one to sixty-three months. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that defendant be committed to the custody of the Bureau of Prisons for a term of sixty months.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1988

United States District Court

District of COLUMBIA

UNITED STATES OF AMERICA
V.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

William J. Burns

Case Number 88-302

FILED

OCT 14 1988

(Name of Defendant)

David Addis, Esq. JAMES F. DAVEY, Clerk
Defendant's Attorney

THE DEFENDANT:

- ☒ xpleaded guilty to count(s) 1-3 after a
☐ was found guilty on count(s) plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. 641	Theft of Government Funds	1
18 U.S.C. 287	False Claims	2
26 U.S.C. 7201	Attempt to Evade Income Tax	3

(Offenses committed 2/25/82 to 5/26/88, 6/29/88, and 2/25/82 to 5/26/88, respectively)

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) and is discharged as to such count(s).
☐ Count(s) (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of \$ 150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

578-54-8762

Defendant's mailing address:

(incarcerated)

Defendant's residence address:

(incarcerated)

10/14/88

Date of Imposition of Sentence

Norma Holloway Johnson
Signature of Judicial Officer

NORMA HOLLOWAY JOHNSON
U.S. DISTRICT JUDGE

Name & Title of Judicial Officer

10/14/88

Date

COURTIAN

Defendant: William J. Burns
Case Number: 88-302

Judgment—Page 2 of 5**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months.

☒ The Court makes the following recommendations to the Bureau of Prisons:

that the defendant be incarcerated at the federal institution at Allenwood, Pennsylvania.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at a.m.
 p.m. on .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on to at
with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

Judgment—Page 3 of 5

Defendant: William J. Burns
Case Number: 88-302

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

three (3) years

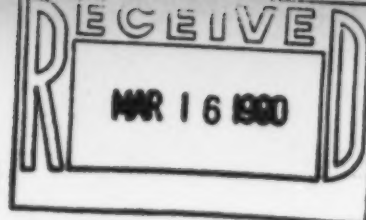
While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall provide the U.S. Probation Office with financial information.

The defendant shall complete one hundred (100) hours of community service per year during supervised release.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT



No. 88-3161

September Term, 19⁸⁹
CA 88-0302-01

United States of America

United States Court of Appeals
For the District of Columbia Circuit

v.

FILED MAR 15 1990

William J. Burns,

CONSTANCE L. DUPRE
CLERK

Appellant

BEFORE: Mikva, Silberman and D. H. Ginsburg, Circuit Judges

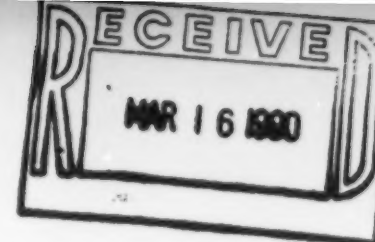
ORDER

Upon consideration of Appellant's Petition for Rehearing,
filed February 23, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: *Robert A. Bonner*
Robert A. Bonner
Deputy Clerk



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-3161

September Term, 19⁸⁹
CA 88-0302-01

United States of America

United States Court of Appeals
For the District of Columbia Circuit

v.

FILED MAR 15 1990

William J. Burns,

CONSTANCE L. DUPRE
CLERK

Appellant

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg,
Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle,
and Thomas, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing En Banc has been
circulated to the full Court. No member of the Court requested
the taking of a vote thereon. Upon consideration of the
foregoing it is

ORDERED, by the Court en banc, that the suggestion is
denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: *Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

Circuit Judge Thomas did not participate in this matter.

APPENDIX B

Rule 31

RULES OF CRIMINAL PROCEDURE

1972 AMENDMENT

Subdivision (e) is new. It is intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, § 408(a)(2).

The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved. See Advisory Committee Note to rule 7(c)(2).

Although special verdict provisions are rare in criminal cases, they are not unknown. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969), especially footnote 41 where authorities are listed.

VII. JUDGMENT

Rule 32. Sentence and Judgment

(a) Sentence.

(1) **Imposition of Sentence.** Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.

(2) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal his sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) **In General.** A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) **Criminal Forfeiture.** When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) **When Made.** A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere

or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) **Report.** The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

(F) such other information as may be required by the court.

(3) **Disclosure.**

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant

and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

(E) Any copies of the presentence investigation report made available to the defendant and the defendant's counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3552(b) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

(d) **Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

Complete Annotation Materials, see Title 18 U.S.C.A.

(e) **Probation.** After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) **[Revocation of Probation.]** (Abrogated Apr. 30, 1979, eff. Dec. 1, 1980)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975, as amended Pub.L. 93-361, July 30, 1974, 88 Stat. 397 and Pub.L. 94-64, § 2, July 31, 1975, 89 Stat. 370; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Pub.L. 97-291, § 3, Oct. 12, 1982, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 215(a), 98 Stat. 2014; Nov. 10, 1986, Pub.L. 99-646, § 25, 100 Stat. 3597; Mar. 9, 1987, eff. Aug. 1, 1987.)

Rule Applicable to Offenses Committed Prior to Nov. 1, 1987

This rule as in effect prior to amendment by Pub.L. 98-473 read as follows:

Rule 32. Sentence and Judgment

(a) **Sentence.**

(1) **Imposition of Sentence.** Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and the defendant's counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and

(C) address the defendant personally and ask the defendant if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) **Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) **Judgment.**

(1) **In General.** A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) **Criminal Forfeiture.** When a verdict contains a finding of property subject to a criminal forfeiture, the

judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) **Presentence Investigation.**

(1) **When Made.** The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) **Report.** The presentence report shall contain—

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological, and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) **Disclosure.**

(A) At a reasonable time before imposing sentence the court shall permit the defendant and the defendant's counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence and shall give the defendant and the defendant's counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and the defendant's counsel shall be disclosed to the attorney for the government.

Complete Annotation Materials, see Title 18 U.S.C.A.

GUIDELINES

under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.

§6A1.3. Resolution of Disputed Factors

- (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.
- (b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In current practice, factors relevant to sentencing are often determined in an informal fashion. The informality is to some extent explained by the fact that particular offense and offender characteristics rarely have a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." *United States v. Marshall*, 519 F.Supp. 751 (D.C. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at *13. Unreliable allegations shall not be considered. *United States v. Weston*, 428 F.2d 626 (9th Cir. 1971).

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

6.2

[256]

June 15, 1987

SENTENCING COMMENTARIES

CHAPTER SIX - SENTENCING PROCEDURES AND PLEA AGREEMENTS

PART A - SENTENCING PROCEDURES

Introductory Commentary

This Part addresses sentencing procedures that are applicable in all cases, including those in which guilty or *nolo contendere* pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

§6A1.1. Presentence Report

A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(c)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.

Commentary

A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(c)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.

§6A1.2. Disclosure of Presentence Report: Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987).

Commentary

In order to focus the issues prior to sentencing the parties are required to respond to the presentence report and to identify any issues in dispute. The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements

6.1

[255]

June 15, 1987

resources to perform shall be no shall specify court needs be imposed. administra- of im- authorized committed. matters as other mat- the profes- nent to the The period of the court, riod of not ation of the ation of any the United ant is in cus- ne court for rsons or the ide the court ent results of whatever rec- consultants resolution of recommenda- ants concern- ements, pro- mission pursu- y believe are After receiv- ndations, the tence the de- sentencing al- le under this

ND REPORT BY AMINERS.—If ipt of a report desires more alable to it as al condition of rder the same mination and l under section

ICE REPORTS.—ort filed pursu- the defendant. nd the attorney a days prior to less this mini- endant.

§ 212(a)(2), Oct. ended Pub. L. Stat. 3593.)

§ 7(a)(1), (2), sub- shall take" and in- dy," after "United

), substituted "the ic or psychological a may be ordered for "It may order chiatric or psycho court be provided

with a written report of the results of the examination pursuant to the provisions of section 4247."

EFFECTIVE DATE OF 1986 AMENDMENT

Section 7(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3552 of title 18, United States Code [Nov. 1, 1987]."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98-473, set out as a note under section 3551 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3672, 4106A of this title.

§ 3553. Imposition of a sentence

(a) **FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) **APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.**—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different

from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) **STATEMENT OF REASONS FOR IMPOSING A SENTENCE.**—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) **PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.**—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) **LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another

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person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989, and amended Pub. L. 99-570, title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub. L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub. L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100-690, title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416.)

AMENDMENTS

1988—Subsec. (c), Pub. L. 100-690 inserted "or other appropriate public record" after "transcription" in second sentence and struck out "clerk of the" before "court" in last sentence.

1987—Subsec. (b), Pub. L. 100-182, § 3(1), (2), substituted "court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result" for "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result".

Pub. L. 100-182, § 3(3), inserted after first sentence "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Pub. L. 100-182, § 16(a), substituted "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." for "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2)."

Subsec. (c)(1), Pub. L. 100-182, § 17, inserted "and that range exceeds 24 months."

1986—Subsec. (a)(7), Pub. L. 99-646, § 81(a), added par. (7).

Subsec. (b), Pub. L. 99-646, § 9(a), inserted provision relating to sentencing in the absence of applicable guidelines.

Subsec. (c), Pub. L. 99-646, § 8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not include an order of restitution".

Subsec. (d), Pub. L. 99-646, § 80(a), struck out "or restitution" after "notice" in heading, and struck out "or an order of restitution pursuant to section 3556," after "section 3555," in introductory text.

Subsec. (e), Pub. L. 99-570 added subsec. (e).

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100-182, set out as a note under section 3006A of this title.

EFFECTIVE DATE OF 1986 AMENDMENTS

Section 8(c) of Pub. L. 99-646 provided that: "The amendments made by this section [amending sections

3553 and 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Section 9(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Section 80(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

Section 81(b) of Pub. L. 99-646 provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98-473, effective Nov. 1, 1987]."

Section 1007(b) of Pub. L. 99-570 provided that: "The amendment made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

EFFECTIVE DATE

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98-473, set out as a note under section 3551 of this title.

AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES

Section 24 of Pub. L. 100-182 provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub. L. 98-473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code;

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act [set out in the Appendix to this title]; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code,

shall apply in the case of an offense committed before the taking effect of such guidelines."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1031, 3551, 3552, 3555, 3562, 3563, 3564, 3565, 3572, 3582, 3583, 3584, 3742 of this title; title 28 sections 991, 994, 995.

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1990.)

REFERENCES IN TEXT

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, is Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1236, as amended. Title I of this Act, known as the Controlled Substances Act, is classified principally to subchapter I (§ 801 et

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United States District Court

88-0302

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

V.

WILLIAM J. BURNS

WARRANT FOR ARREST

CASE NUMBER: 88-0520M-01

To: The United States Marshal
and any Authorized United States OfficerYOU ARE HEREBY COMMANDED to arrest WILLIAM J. BURNS
Name

and bring him or her forthwith to the nearest magistrate to answer a(n)

☐ Indictment ☐ Information ☒ Complaint ☐ Order of court ☐ Violation Notice ☐ Probation Violation Petition

charging him or her with (brief description of offense)

Theft of Government Funds in Excess of \$100.00 and Racketeering

In violation of Title 18 United States Code, Section(s) 641 and 1962(c)LOUIS F. OBERDORFER
Name of Issuing OfficerUSDJ
Title of issuing Officer
JUL 12 1988Louis F. Oberdorfer
Signature of Issuing OfficerD.C.
Date and LocationBail fixed at \$ _____ by _____
Name of Judicial Officer

RETURN

This warrant was received and executed with the arrest of the above-named defendant at 515 22nd St NW8th Fl Washington DCDATE RECEIVED
7/12/88

NAME AND TITLE OF ARRESTING OFFICER

SIGNATURE OF ARRESTING OFFICER

DATE OF ARREST
7/12/88S.C. GRIGGS
POSTAL INSPECTORSC Griggs

APPENDIX C

1 OF THE GOVERNMENT AGENCY.

2 UNDER THE INFORMATION, YOUR HONOR, FROM FEBRUARY 25TH
3 OF 1982, AND THROUGH MAY 26TH OF 1988, MR. BURNS PREPARED FALSE
4 AND FRAUDULENT 1166'S IN THE NAME OF VINCENT KAUFFMAN. THESE
5 WERE SIGNED BY MR. BURNS AS CERTIFYING OFFICER AND ONLY HIS
6 SIGNATURE WAS REQUIRED TO MAKE IT A VALID DOCUMENT.

7 MR. BURNS THEN CAUSED THESE TO BE SUBMITTED TO THE
8 UNITED STATES TREASURY, WHICH IS ALSO LOCATED IN THE DISTRICT OF
9 COLUMBIA, AND THESE FORMS HAD INSTRUCTIONS ON THEM TO PREPARE A
10 GOVERNMENT CHECK AGAINST THE A.I.D. FUNDS, SEND THAT CHECK TO
11 SIGNET BANK IN WASHINGTON, D.C. SO THEY COULD BE DEPOSITED IN AN
12 ACCOUNT IN THE NAME OF VINCENT KAUFFMAN.

13 IN REALITY, THE VINCENT KAUFFMAN ACCOUNT HAD BEEN
14 OPENED BY MR. BURNS, MAINTAINED BY MR. BURNS, ALL DEPOSITS WERE
15 TREASURY CHECKS AND ONLY TREASURY CHECKS DONE IN THE MANNER I'VE
16 JUST DESCRIBED AND ALL WITHDRAWALS WERE DONE BY MR. BURNS FROM
17 THAT ACCOUNT EITHER THROUGH THE MONEY MACHINE OR THROUGH CHECKS
18 WHICH MR. BURNS WROTE, SIGNED THE NAME VINCENT KAUFFMAN AND MADE
19 OUT TO HIMSELF.

20 THOSE FUNDS WERE THEN TRANSFERRED IN LARGE PART INTO
21 MR. BURNS' OWN ACCOUNTS IN HIS OWN NAME IN MARYLAND. THE MONEY
22 WAS SPENT FOR HIS HOUSE, CARS, FURNITURE, TRIPS, JEWELRY AND
23 OTHER PERSONAL AND LUXURY ITEMS FOR MR. BURNS AND HIS FAMILY.

24 AS TO THE 287 COUNT, THE FALSE CLAIMS ACCOUNT, AFTER
25 THE INVESTIGATION UNCOVERED WHAT MR. BURNS HAD BEEN DOING WITH

1 THE 1166'S, TWO MORE WERE SUBMITTED IN JUNE, JUNE 29TH OF 1988.
2 THEY WERE AGAIN SUBMITTED TO THE UNITED STATES TREASURY IN THE
3 DISTRICT OF COLUMBIA, FILLED OUT AND SIGNED BY MR. BURNS. ONE
4 WAS FOR \$23,804.21. THE OTHER WAS FOR \$22,270.46. PAYMENT WAS
5 NOT MADE ON THOSE, BUT THEY WERE FALSE CLAIMS, IN THAT NO ONE
6 NAMED VINCENT KAUFFMAN EXISTED, AS MR. BURNS KNEW, AND NO
7 PAYMENT WAS DUE MR. KAUFFMAN FROM A.I.D.

8 AS TO THE ATTEMPTED EVASION OF TAXES OR TAX EVASION
9 COUNT, YOUR HONOR, WE WOULD REFERENCE AGAIN WHAT WE HAVE
10 PREVIOUSLY SAID ABOUT MR. BURNS' SCHEME TO EMBEZZLE AND STEAL
11 MONEY FROM A.I.D. AND FROM THE TREASURY.

12 MR. BURNS' TAX RETURN FORMS FOR THE YEARS 1982 THROUGH
13 1987 DIDN'T REFLECT ANY OF THIS MONEY THAT HE HAD MADE THROUGH
14 VINCENT KAUFFMAN, AND SPECIFIC IN 1982 THERE WAS \$93,289 IN
15 TAXABLE INCOME WHICH WAS NOT RECORDED, WHICH RESULTED IN A TAX
16 DUE WHICH WAS NOT PAID OF \$40,375. IN 1983 THERE WAS \$61,270 OF
17 UNREPORTED INCOME, RESULTING IN A TAX DUE AND OWING WHICH WAS
18 NOT PAID OF \$26,750. IN 1984, \$190,610 OF UNREPORTED TAXABLE
19 INCOME, RESULTING IN A TAX DUE AND OWING WHICH WAS NOT PAID OF
20 \$91,157. IN 1985 THERE WAS \$409,064 OF TAXABLE INCOME WHICH WAS
21 NOT REPORTED AND THERE WAS A TAX DUE AND OWING WHICH WAS NOT
22 PAID OF \$192,697. IN 1986 THERE WAS \$181,806 OF TAXABLE INCOME
23 WHICH WAS NOT REPORTED AND A TAX DUE AND OWING WHICH WAS NOT
24 PAID OF \$76,326. AND IN 1987 THERE WAS \$142,790 OF TAXABLE
25 INCOME WHICH WAS NOT REPORTED AND A TAX DUE AND OWING OF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America)
)
 vs.) Docket No. 88-0302-01
)
 BURNS, William J.)

PRESENTENCE REPORT

Prepared for: The Honorable Norma H. Johnson
United States District Judge

Prepared by: Ralph Ardito, Jr.
United States Probation Officer
Telephone: 535-3181

Sentencing date: October 11, 1988 at 9:45 a.m.

Offense: Count 1: 18 U.S.C. 641, Theft of
Government Funds, a class C felony

Count 2: 18 U.S.C. 287, False
Claims Against the Government, a
class D felony

Count 3: 26 U.S.C. 7201, Tax
Evasion, a class D felony

Release status: Arrested on July 12, 1988;
released on July 18, 1988, on a
\$500,000 property bond and has
remained in the community since
that time.

Identifying Data

Date of Birth: February 19, 1940
Social Security Number: 578-54-8762
Address: 3048 Brownstone Court
Burtonsville, Maryland 20866

Detainers: None

Codefendants: None

10/14/88: 60 months confinement, 3yrs. supervised release
100 hrs community service per year in lieu
of fine.

Court recommends FCI. Allenwood.

BURNS, William J.

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James Cole
Public Integrity Section
Department of Justice
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Washington, D.C. 20005
Telephone: 786-5056

Defense Counsel
David Addis (Retained)
c/o Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: 785-9700

Date Report Prepared:
Date Revised:

September 20, 1988

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On August 10, 1988, William J. Burns was named in a three count Information charging him with Theft of Government Property, in violation of Title 18, U.S. Code, Section 641 (Count 1); False Claims Against the Government, in violation of Title 18, U.S. Code, Section 287 (Count 2); and Tax Evasion, in violation of Title 26, U.S. Code, Section 7201 (Count 3). On August 11, 1988, the defendant appeared before the Honorable Norma Holloway Johnson, at which time he entered a plea of guilty to the three count Information. At the time of plea, a sentencing date was scheduled for October 11, 1988, at 9:45 a.m.
2. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

3. None.

The Offense Conduct

4. In December of 1987, the Agency for International Development conducted a routine background check on the defendant as he maintained a security clearance with that agency. The investigation determined that the defendant was living in a Burtonsville, Maryland home valued in excess of \$400,000, which raised suspicions as the defendant's income was \$35,108. As a result, a credit check was done, where the agency discovered numerous bank accounts in the defendant's name. An analysis of the bank records revealed numerous checks authorized by the Agency for International Development originally payable to Vincent Kaufman, subsequently deposited into Mr. Burns' account. It was later proven by way of handwriting analysis that Vincent Kaufman was, in fact, William Burns.
5. The internal investigation determined the following scheme, which resulted in the theft of Government funds by the defendant. Mr. Burns, as supervisor of the Financial Management Section, with authority to approve travel vouchers, would issue a false claim (Form 1034) in the name of Vincent Kaufman. Vincent Kaufman allegedly was a contractor who would move furniture for the Agency for International Development. The false form was prepared by a clerk and subsequently approved by the defendant. The voucher would then be sent to the U.S. Treasury Department for payment to Vincent Kaufman. The payment checks were then sent directly to the account of Vincent Kaufman for deposit and subsequently removed by the

defendant. The Government has determined that 53 fraudulent checks were issued and the total amount of the theft was \$1,261,184.92.

6. Mr. Burns fully admitted that he committed this offense, stating that he was in financial difficulty at the time it occurred. Also, he was being divorced from his first wife and at least initially, the stolen funds were used to pay his required child support payments. Subsequently, the money was used to impress his girlfriend, Kathy Martini, whom he later married. He said that not only did he deceive his wife and family, but ultimately, himself.
7. Between February 25, 1982 and May 26, 1988, the defendant embezzled from the Agency for International Development \$1,261,184.92, which monies he failed to report to the Internal Revenue Service for calendar years 1982, 1983, 1984, 1985, 1986, and 1987. As a result of his failure to report this income, he has an outstanding tax obligation of \$475,685.

Adjustment for Obstruction of Justice

8. The Probation Officer has no information to suggest that Mr. Burns impeded or obstructed justice in this case.

Adjustment for Acceptance of Responsibility

9. Mr. Burns has fully accepted responsibility for the theft of approximately \$1.2 million. He has fully cooperated with the Government in identifying the properties and monies that were recoverable and he has agreed to transfer any and all assets to the Government.

Offense Level Computation

10. Counts 1 and 2 of the Information represent related offense conduct and each count is treated as a single group. Section 3D1.2(1).
11. Because Count 3 of the Information represents an unrelated offense, this count will be treated as a separate group. Section 3D1.3(a).

Counts 1 and 2 - Theft of Government Funds and False Claims Against the Government

12. Base Offense Level: The guideline for 18 U.S.C. 641 and 18 U.S.C. 287 is found in Section 2B1.1(b)(1) and 2F1.1 of the Guidelines. Those sections provide that Theft of Government Funds and False Claims Against the Government in the amount of \$1,215,110.45 have a base offense level of 17.

13. Specific Offense Characteristics: The defendant was a public servant who violated a trust and used a special skill in a manner to significantly facilitate the commission of the offense. Based on Section 3B1.3, the offense level is increased two levels.

14. Victim Related Adjustment: None

15. Adjustment for Obstruction of Justice: None

16. Adjusted Offense Level (subtotal):

Count 3 - Tax Evasion

17. Base Offense Level: The guideline for 26 U.S.C. 7201 is found in Section 2T1.1 (a) of the Guidelines. That section provides that Tax Evasion has a base offense level of 14.

18. Specific Offense Characteristics: As the defendant failed to report income exceeding \$10,000, an increase of 2 levels is appropriate (Section 2T1.1(b)(1)(A)).

19. Adjustment for Role in the Offense: None

20. Victim Related Adjustment: None

21. Adjustment for Obstruction of Justice: None

22. Adjusted Offense Level (subtotal):

Multiple Count Adjustment (see Chapter 3, Part D).

Units

Counts 1 and 2: Adjusted Offense Level	19	
Count 3: Adjusted Offense Level	16	
Total Units		2
Greater of the Adjusted Offense Levels	19	
Increase in Offense Level	2	
Combined Adjusted Offense Level	21	

23. Adjustment for Acceptance of Responsibility: The defendant fully accepted his responsibility in Counts 1, 2 and 3 of the Information. Based on Section 3E1.1(a), the combined adjusted offense level is reduced two levels.

24. Total Offense Level:

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications.

25. None.

Criminal Convictions.

26. None.

Other Criminal Conduct

27. None.

PART C. SENTENCING OPTIONS

Custody

28. Statutory Provisions: The maximum term of imprisonment for Count 1 is ten years.

29. Statutory Provisions: The maximum term of imprisonment for Count 2 is five years.

30. Statutory Provisions: The maximum term of imprisonment for Count 3 is five years.

31. Guideline Provisions: Based on a total offense level of 19, and a criminal history category of I, the guideline imprisonment range is 30 to 37 months.

Supervised Release

32. Statutory Provisions: A term of not more than three years may be imposed in Count 1 (18 U.S.C. 3583(b)(2)).

33. Statutory Provisions: A term of not more than three years may be imposed in Counts 2 (18 U.S.C. 3583(b)(2)).

34. Statutory Provisions: A term of not more than three years may be imposed in Count 3 (18 U.S.C. 3583(b)(2)).

35. Guideline Provisions: A term of at least two years, but not more than three years in Count 1 (Section 5D3.2(b)(2)).

36. Guideline Provisions: A term of at least two years, but not more than three years in Count 2 (Section 5D3.2(b)(2)).

37. Guideline Provisions: A term of at least two years, but not more than three years in Count 3 (Section 5D3.2(b)(2)).

Probation

38. Statutory Provisions: The defendant is not eligible for probation (18 U.S.C. 3561(a)(1)).

39. Guideline Provisions: The defendant is not eligible for probation according to Section 5C2.1(f).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. The defendant was born to the legal union of Edward and Margaret (nee: Ellis) Burns in New York, New York on February 19, 1940. The defendant's father was employed as a Government worker and his mother was a housewife. He described his upbringing as normal, with no unusual problems. The defendant has three older siblings, Edward Burns who is employed as a certified public accountant; Margaret Burns Hughes who is employed as a secretary; and Nora Burns Hanrahan who works as a trainer for the C&P Telephone Company. All three siblings remain close with the defendant and reside in the metropolitan Washington, D.C. area. The defendant is the only sibling to have been involved in the criminal justice system. Mr. Burns' father died at the age of 78 and his mother died, also at the age of 78.
41. The defendant was initially married to Barbara (nee: Robeson) Burns on February 8, 1962 in Bethesda, Maryland. As a result of the marriage, three children (Susan, age 19; Deborah, age 18; and Jacqueline, age 15) were born. The couple remained together until each sought a voluntary separation based on irreconcilable differences. On November 9, 1982, a decree of divorce was granted in the Circuit Court for Montgomery County (Equity No. 76296). The settlement agreement decreed that the defendant's wife would have custody of the three daughters and Mr. Burns was obligated to pay \$210 per month for each child until his daughters reached the age of 18. The defendant was granted visitation rights. Mr. Burns agreed to transfer to his first wife his interest in their residence for the sum of \$15,000. The defendant explained that he continues to maintain an excellent relationship with his three children and he has met the Court-ordered child support requirements. He characterized his current relationship with his former wife as poor.
42. The defendant married his current wife, Cathy (nee: Martini) Burns, age 32, on October 26, 1985, in Lanham, Maryland. As a result of this union, twin boys (William, Jr. and Robert Edward), age 23 months, were born. Mr. and Mrs. Burns appeared to have a very caring and supportive marriage and they remain committed to each other during this difficult time. It was obvious that both individuals were under a great deal of stress, the result of Mr. Burns' pending incarceration.

Mental and Emotional Health

43. There is no indication to suggest that Mr. Burns has suffered from any psychological or psychiatric impairment. The defendant was able to articulate his motivation for his involvement in the instant offense and he had excellent recall.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. The defendant stands 5'8" tall and weighs approximately 170 pounds. He characterized his physical health as excellent.
45. The defendant explained that he has never used any narcotic or mind-altering drugs. He remarked that he drinks alcohol occasionally and on a social basis.

Education and Vocational Skills

46. Mr. Burns graduated from Coolidge High School in June of 1958, in Washington, D.C. He attended Montgomery College in Takoma Park, Maryland from 1958 to 1961, majoring in business administration.

Employment Record

47. From 1967 until July 1988, Mr. Burns was employed with the United States Agency for International Development, located at 522 22nd Street, N.W., Washington, D.C. On July 29, 1988, and as a result of his arrest, he was suspended by that agency without pay. At the time of the suspension, he was employed as a supervisor for the Financial Management Section as a GS-11/step 9, earning \$35,108 per year.
48. His former supervisor, Mr. Kyle Schooler, said that in his opinion, the defendant was hard-working, reliable and trustworthy. Further, Mr. Burns' integrity was never questioned during the two year period Mr. Schooler supervised the defendant.
49. Prior to this employment, he was also employed by the United States Postal Service and the Department of Labor for approximately four years.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. Count 1: The maximum fine is \$250,000 (18 U.S.C. 3571(b)(1)(A)).
51. Count 2: The maximum fine is \$250,000 (18 U.S.C. 3571(b)(1)(A)).

52. Count 3: The maximum fine is \$250,000 (18 U.S.C. 3571(b)(1)(A)).
53. A special assessment of \$50 on each count (total: \$150) is mandatory (18 U.S.C. 3013).
54. According to the Public Integrity Section, Department of Justice, the United States Government is the victim in this case. Specifically, the defendant illegally stole \$1,261,184.92. Per the plea agreement, the defendant is to transfer all monies and title to properties to the United States Government. It is estimated that the United States will receive between \$600,000 and \$700,000 in monies and properties when the transfer is completed. Thus, the loss to the Government is \$561,184.92. In the event that there is Court-ordered restitution, it should be payable to the U.S. Treasury.

Guideline Provisions

55. The fine guideline range for this offense is from \$6,000 to \$250,000.

Defendant's Ability to Pay

Assets

Cash (wife, per plea agreement)	\$ 10,000
Unencumbered Assets	
Vehicle (Ford Aerostar Van (wife))	16,000
Encumbered Assets	None
TOTAL ASSETS	26,000

Liabilities

Secured Debts	None
Unsecured Debts	
Legal Fees (defendant)	35,000
Legal Fees (wife)	15,000
Federal tax obligation (before penalties and interest)	475,685
Connecticut Avenue Caterers	1,500
Credit cards (total)	8,977
TOTAL DEBT	536,162
NET WORTH	- 510,162

Monthly Cash Flow

Necessary Living Expenses

Income	None
Mortgage	695
Food	800
Medical expenses	130
Water	55
Gas	55
Electric	196
Telephone	40
Life Insurance (no cash value)	100
Credit cards	207
Child support payment	210
TOTAL	2,488

NET MONTHLY CASH FLOW - 2,488

56. It appears from the defendant's financial statement that he is unable to pay a fine, the cost of incarceration or supervised release.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

57. There are no factors that would warrant departure from the guideline sentence.

PART G. IMPACT OF THE PLEA AGREEMENT

58. The defendant entered pleas of guilty to all counts of the information in which he was charged. Therefore, the plea agreement did not impact on the possible sentence that could be imposed.

Respectfully submitted,

EUGENE WESLEY, JR.
CHIEF U.S. PROBATION OFFICER

By: Ralph Arcito, Jr.
U.S. Probation Officer

RARDITOjr:nlc

Reviewed and Approved:

Arthur Carrington
Arthur Carrington
Supervising U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the Government.

OBJECTIONSBy the Government

The Assistant U.S. Attorney has reviewed the presentence report but has filed no objections within the prescribed ten-day period.

By the Defendant

The defendant, and his counsel, have reviewed the presentence report, but have filed no objections within the prescribed ten-day period.

CERTIFIED BY

EUGENE WESLEY, JR.
CHIEF U.S. PROBATION OFFICER

By:

Ralph Ardito, Jr.
Ralph Ardito, Jr.
U.S. Probation Officer

Reviewed and Approved:

Arthur Carrington
Arthur Carrington
Supervising U.S. Probation Officer

Date: _____



Kuzma

CR 88-302

Washington, D.C. 20530

AUG 11 1988 FILED

JAMES F. DAVEY, Clerk

JAMES F. DAVEY, Clerk

FILED

AUG 11 1988

JAMES F. DAVEY, Clerk

David R. Addis, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037

Albert H. Turkus, Esq.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037

Dear Messrs. Levine and Turkus:

Re: United States v. William J. Burns
No. 88-0520M/Misc. No. 88-226/Cr. No. 88-0302

I write to set out the terms of the agreement reached between the United States of America, William J. Burns, and Kathy Burns concerning the above referenced matters. The agreement is as follows:

1. Mr. Burns agrees to waive indictment and plead guilty to one count of theft of government funds (18 U.S.C. §641), one count of false claims against the United States (18 U.S.C. §287), and one count of tax evasion (26 U.S.C. §7201) as set out in the information attached as Exhibit A to this agreement. It is understood by all parties to this agreement that this plea will be covered by the Sentencing Guidelines. Based on each party's calculations it is assumed that a sentencing range of Level 19, Criminal History Category I, will apply to this case. If calculations by the United States Probation Office or the Court produces a different sentencing range, either party may withdraw from this agreement and any property transfers done pursuant to this agreement will be null and void. No agreement exists as to what sentence Mr. Burns will receive within that sentencing range or what recommendation the United States will make at the time of sentencing. The United States will not oppose a

continuation of Mr. Burns' present bond until the time of his surrender to the penal institution designated by the Bureau of Prisons.

2. Mr. Burns agrees to submit to full debriefings, under oath, and to provide truthful statements as to any and all criminal activity in which he has been involved or has knowledge, and agrees to cooperate fully with the United States in any investigations and prosecutions which may result from these debriefings.
3. Mr. Burns and his wife, Kathy Burns, agree to submit to full debriefings, under oath, and to provide truthful statements concerning the nature, location, method of acquisition and other details of any and all of their joint and individual financial holdings, including but not limited to real property, personal property, stocks, bonds, securities, safe deposit boxes, foreign bank accounts, foreign investments, domestic bank accounts, and domestic investments.
4. Any and all real property, personal property, money, stocks, bonds, securities, and other things of value owned by Mr. or Mrs. Burns will be conveyed and surrendered to the United States. Any and all property or things of value transferred in any way by Mr. or Mrs. Burns to persons, other than bona fide purchasers for value, will be recovered by Mr. or Mrs. Burns and conveyed and surrendered to the United States. The only exceptions to this are the following items to be retained by Mrs. Burns:
 - a. Property and funds which Mrs. Burns can establish were not acquired with any funds provided by Mr. Burns nor derived in any way from Mr. Burns;
 - b. One automobile and funds in the amount of \$10,000, to the extent Mrs. Burns' funds and property referenced in sub-paragraph (a), apart from necessary household and certain personal items, do not amount to this figure; and
 - c. Necessary household items, one wedding and engagement ring set, and the wedding gifts listed on Exhibit B to this agreement.
5. Mr. Burns will execute an agreement with the United States, which is not dischargeable in bankruptcy, wherein if he acquires funds over a specified value he will agree to pay to the United States the difference between the liquidated value of the property conveyed and surrendered to the United States under paragraph 4

above and the total amount the United States has lost as a result of his criminal acts throughout the period of his government employment.

6. The United States will not prosecute Mr. Burns for any other criminal activity related to this matter. All charges currently pending and not incorporated in this agreement will be dismissed by the United States after Mr. Burns' plea has been accepted by the Court.
7. Any statements made by Mr. or Mrs. Burns pursuant to this agreement will not be used against the person making the statement in any subsequent criminal proceeding other than perjury, making a false statement, or enforcement of this agreement. This grant of use immunity is understood by all parties to be only as extensive as the immunity provided for in 18 U.S.C. 6001 et seq., except that the United States is free to use information derived from such statements against the person making the statements.
8. The United States will bring no criminal charges against Mrs. Burns in relation to this matter.
9. Nothing in this agreement affects or is intended to affect any civil tax liability of Mr. and/or Mrs. Burns.
10. If it is determined by the United States that Mr. or Mrs. Burns has knowingly given false, incomplete, or misleading testimony or information, or has failed in any way to fulfill completely each and every one of their respective obligations under this agreement, they will be in violation of this agreement and the United States will be released from its commitment to honor any and all of its obligations under this agreement. Mr. and Mrs. Burns understand and explicitly agree that if they fail to fulfill any of their respective obligations under this agreement, including the giving of truthful information, the United States would be free, where appropriate in its discretion, to prosecute either or both of them for perjury, false statements, and/or obstruction of justice, to move to vacate Mr. Burns' guilty plea, and to nullify this agreement in its entirety.
11. No promises, representations, or inducements have been made to Mr. and Mrs. Burns other than what is contained in this letter. Any changes to this agreement must be made in writing and signed by all parties.

If this agreement comports with the understanding of all parties please signify so by having all parties sign it below.

Sincerely,

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK

By [Signature]
10/12/88

[Signature]
James M. Cole
Counsel for the United States

[Signature]
Michael K. Fee
Counsel for the United States

We have consulted with our attorneys and fully understand all of our rights in relation to this matter. We have read the foregoing agreement between the United States of America and William J. Burns and Kathy Burns and have carefully reviewed every part of it with our attorneys. We understand all of the terms and agree to them.

8-11-88
DATE

[Signature]
WILLIAM J. BURNS

8-11-88
DATE

[Signature]
KATHY BURNS

We are the attorneys for William J. Burns and Kathy Burns. We have fully explained their respective rights to them in relation to this matter. We have carefully reviewed every part of this plea agreement with Mr. and Mrs. Burns. To our knowledge, their decision to enter into this agreement is an informed and voluntary one.

8/11/88
DATE

[Signature]
DAVID R. ADDIS
Counsel for William J. Burns

8/11/88
DATE

[Signature]
ALBERT H. TURKUS
Counsel for Kathy Burns

OCT 14 1988

AGREEMENT

JAMES F. DAVEY, Clerk

This Agreement sets forth the terms and procedures through which WILLIAM J. BURNS will satisfy his obligation to make restitution to the United States of America in the amount of \$1,371,779.94, which, according to WILLIAM J. BURNS, represents the total amount of funds he obtained from the United States of America through his scheme of theft and false claims in the name of Vincent Kauffman. Should evidence come to the attention of the United States which establishes that WILLIAM J. BURNS has illegally obtained funds from the United States above and beyond this restitution figure, that additional amount will not be covered by this Agreement nor will it be in any way effected by this Agreement. It will, however, be due and owing to the United States pursuant to paragraph 5 of the Plea Agreement of August 11, 1988, which is hereby incorporated into this Agreement in its entirety and is attached hereto as Attachment A. The scheme of theft and false claims against the United States of America was acknowledged by WILLIAM J. BURNS in the United States District Court on August 11, 1988, and formed the basis for a three-count criminal information to which WILLIAM J. BURNS pled guilty. WILLIAM J. BURNS pled guilty to the criminal information pursuant to a Plea Agreement. This Agreement between the United States of America and WILLIAM J. BURNS is entered into pursuant to the Plea Agreement executed by the parties and filed in the United States District Court for the District of Columbia on August 11, 1988.

Accordingly, for and in consideration of the mutual promises and truthful representations made in this Agreement and the Plea

Agreement which is incorporated herein, the United States of America and WILLIAM J. BURNS agree as follows:

1. WILLIAM J. BURNS hereby agrees to assign, transfer, deliver, and convey to the United States all of his real property, personal property, money, stocks, bonds, and any and all other things of value including but not limited to the items specified in this agreement and its attachments.

a. Real Property: WILLIAM J. BURNS represents that the only real property he owns and the only real property he acquired with the proceeds of his scheme is a residence known as 3048 Brownstone Court, Burtonsville, Maryland, more particularly described in a deed on record in Montgomery County, Maryland as "lot numbered Eighteen (18) in Block 'D' in the subdivision known as 'FAIRLAND GARDENS' as per plat recorded in Plat Book 122 at Plat 14366 among the Land Records of Montgomery County, Maryland." (hereinafter the "residence"). WILLIAM J. BURNS agrees that the afore-described residence and surrounding property, structures, appurtenances, improvements, and fixtures thereon shall be sold and the proceeds shall be assigned and delivered to the United States of America. WILLIAM J. BURNS agrees that he will permanently vacate the residence prior to October 14, 1988, the date upon which WILLIAM J. BURNS is to be sentenced in the United States District Court for the

District of Columbia. WILLIAM J. BURNS further agrees that he will cooperate fully with the United States and will execute any and all powers of attorney and other documents necessary to accomplish the sale of the residence and its transfer to a buyer. Upon the execution of powers of attorney and any other necessary documents by WILLIAM J. BURNS, and delivery of those documents to the United States, WILLIAM J. BURNS agrees that he relinquishes all title, right, claim, or interest which he may have in the residence, or the proceeds derived from its sale. WILLIAM J. BURNS agrees that he will cooperate with, and not interfere with or obstruct in any way the sale of the residence.

b. Vehicles: WILLIAM J. BURNS agrees that through this Agreement, title to the vehicles identified in Attachment B are hereby transferred to the United States so that they may be sold. WILLIAM J. BURNS agrees to execute any and all documents to effect the transfer and that upon transfer of these vehicles, any right or interest he may have in the vehicles or the proceeds derived from the sale of the vehicles shall terminate.

c. Personal Property: WILLIAM J. BURNS agrees that upon execution of this Agreement, all right, title and interest which he may have in the property identified in Attachment C, and any other property he may own individually or

not been liquidated, expended, or obligated for attorneys expenses or living expenses as of the date upon which this Agreement is executed, shall be and hereby are irrevocably transferred to the United States of America.

e. Accounting: The property herein transferred to the United States shall be liquidated and sold by the United States. Notice of the date, location, and method of the liquidation and sale will be provided to WILLIAM J. BURNS at least two weeks prior to the sale. Upon completion of the liquidation or sale of all property encompassed by this Agreement, the United States shall provide WILLIAM J. BURNS with a figure constituting the total net proceeds of the liquidation and sale. This figure, plus any residuum from paragraph "d" above, shall be subtracted from the total amount of restitution WILLIAM J. BURNS owes to the United States. The resulting difference shall be the outstanding restitution amount for which WILLIAM J. BURNS shall remain obligated to the United States. This outstanding restitution obligation shall be the sole obligation of WILLIAM J. BURNS and shall not be the responsibility of his wife or heirs.

2. WILLIAM J. BURNS agrees that for purposes of paying the outstanding restitution amount, the following conditions shall apply: (1) he shall annually pay over to the United States fifty percent (50%) of all his gains and earnings above a yearly income

of forty-thousand dollars (\$40,000); (2) he shall annually pay over to the United States one-hundred percent (100%) of all his gains and earnings above a yearly income of seventy-thousand dollars (\$70,000); (3), for purposes of this Agreement, the yearly income of WILLIAM J. BURNS shall be his adjusted gross income for federal income tax purposes, plus any real or personal property, chose in action, or cash received by him as a prize, windfall, gift, or inheritance during the calendar year. Yearly income of WILLIAM J. BURNS shall also include income of whatever kind derived by WILLIAM J. BURNS from a sole proprietorship, partnership, corporation, or trust created by WILLIAM J. BURNS or in which WILLIAM J. BURNS has a substantial interest; (4) the threshold yearly income amounts of \$40,000 and \$70,000 shall be adjusted, if necessary, for inflation at a rate consistent with the Consumer Price Index; (5) payments towards the outstanding restitution amount as prescribed in this Agreement shall be made in the form of a certified check or money order made payable to the "United States Treasury" and delivered to the Inspector General for the United States Agency for International Development; (6) payments required by this Agreement shall be made on or before May 15 of each calendar year; (7) for purposes of documenting his yearly income, WILLIAM J. BURNS agrees to submit to the Inspector General for the United States Agency for International Development a sworn, notarized statement setting out his adjusted gross income from his federal income tax return, plus any other gains and income not listed on the tax return. This statement shall be delivered to the Inspector General for

the United States Agency for International Development by May 1st of each year until the outstanding restitution obligation has been satisfied.

3. WILLIAM J. BURNS agrees to release all claims on all monies due WILLIAM J. BURNS as a result of his employment with the United States Agency for International Development. This amount includes \$30,286.78 in retirement funds, \$1,788 held in the Thrift Savings Plan, and \$1,967.94 in accrued annual leave. Upon execution of this Agreement, all right title and interest in these funds shall be and hereby are transferred irrevocably to the United States and shall be applied to WILLIAM J. BURNS' total restitution obligation to the United States.

4. The property transfers set forth in this Agreement shall be binding upon the heirs, administrators, executors, successors, and assigns of WILLIAM J. BURNS.

5. This Agreement in no way effects the rights or obligations of any person not a party to this Agreement as to any of the property or other items covered by this Agreement.

6. As provided in the Plea Agreement (Attachment A), in no event do the terms of this Agreement encompass or affect in any way any civil tax liability of WILLIAM J. BURNS.

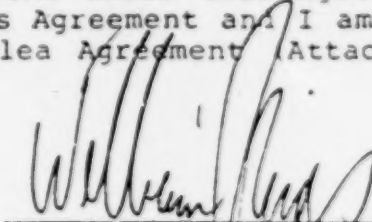
7. In no event is it intended that this Agreement encompass or affect on any way any fines, special assessments or other financial penalties which may be imposed at sentencing by the United States District Court for the District of Columbia.

8. In no event may the restitution obligation of WILLIAM J. BURNS described in this Agreement be dischargeable in bankruptcy or be reduced through any means other than payment.

IN WITNESS WHEREOF, the United States, through its undersigned attorney and authorized representative, WILLIAM J. BURNS and his attorney, have hereunto set their hands:

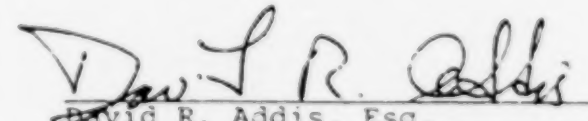
I am WILLIAM J. BURNS and I have consulted with my attorney concerning my rights and obligations under this Agreement. I fully understand the terms of this Agreement and I am executing this Agreement pursuant to the Plea Agreement (Attachment A) which I entered into voluntarily.

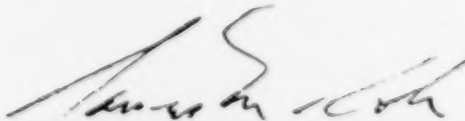
10/14/88
DATE


WILLIAM J. BURNS

I am David R. Addis, Esq., attorney for WILLIAM J. BURNS. I have carefully explained the terms of this Agreement in its entirety to my client.

10/14/88
DATE


David R. Addis, Esq.
Attorney for William J. Burns


JAMES M. COLE
Attorney for the
United States of America

10/14/88
DATE

1 HUMANITARIAN FUNCTIONS.

2 NOW, IT CAN BE NOTED THAT THE MONEY THAT MR. BURNS TOOK
3 MIGHT HAVE BEEN FROM A LEFTOVER TRAVEL FUND HERE OR THERE, BUT
4 THESE UNUSED FUNDS WHICH HE DID TAKE WOULD HAVE GONE INTO THE
5 COFFERS OF A.I.D., COULD HAVE GONE INTO MANY OTHER AREAS TO DO
6 GOOD WORK. THIS IS SOMETHING WHICH SHOULD BE CONSIDERED ON THE
7 SIDE OF HARM, WHICH SHOULD BE CONSIDERED AS TO THE LEVEL OF
8 PUNISHMENT THAT'S APPROPRIATE.

9 MUCH CAN BE SAID ABOUT THE LAXNESS WITH WHICH A.I.D.
10 HAD TREATED SOME OF THIS MONEY AND ITS ACCOUNTING PROCEDURES ON
11 THE MONEY, CREATING PERHAPS A TARGET OF OPPORTUNITY FOR
12 MR. BURNS. BUT WHAT MUST BE REMEMBERED IS THAT MR. BURNS WAS
13 PUT IN THE POSITION OF TRUST AT A.I.D. TO PROTECT THE PUBLIC'S
14 MONEY IN THESE KINDS OF ENDEAVORS AND HE WAS CHARGED WITH MAKING
15 SURE IT WENT WHERE IT WAS SUPPOSED TO GO. HE WAS THE CONTROL.

16 MR. BURNS WAS NOT A MASTER CRIMINAL. HE WAS A PERSON
17 WHO WAS GIVEN SOME TRUST. HE WAS ASKED TO PROTECT MONEY AND HE
18 ABUSED THAT TRUST IN AN EXTREME FASHION.

19 IT IS ALWAYS SAD WHENEVER A PERSON WHO IS IN A PUBLIC
20 OFFICE ABUSES THE TRUST THAT THEY ARE GIVEN IN THAT OFFICE.
21 THERE ARE UNDOUBTEDLY OTHERS IN OTHER GOVERNMENTS AGENCIES WHO
22 ARE IN A SIMILAR SITUATION AS MR. BURNS HAD OCCUPIED AT A.I.D.
23 AND THIS SENTENCE THAT YOU GIVE TODAY, YOUR HONOR, MUST SEND A
24 MESSAGE OF DETERRENCE TO THOSE PEOPLE.

25 WE ARE THEN LEFT WITH THE ENORMITY OF MR. BURNS' CRIME.

1 RESTITUTION AND THAT YOU CHOOSE TO PAY BACK ALL THAT YOU STOLE,
2 BUT THE TRUTH OF THE MATTER IS IF THERE HAD NOT BEEN AN
3 INVESTIGATION, THERE IS NO REASON FOR ME TO BELIEVE THAT IT
4 WOULD HAVE STOPPED IN MAY OF '88. IT STOPPED IN MAY OF '88
5 BECAUSE OF AN INVESTIGATION.

6 YOU, AN EMPLOYEE FOR OVER 20 YEARS, NOT ONLY WERE YOU
7 APPARENTLY TRUSTED BY YOUR EMPLOYERS, BUT YOU HAD TAKEN AN OATH
8 TO PERFORM YOUR JOB AND ONLY YOUR JOB. YOU VIOLATED THAT OATH.
9 YOU VIOLATED EVERY BIT OF TRUST THAT ANYONE HAD PUT IN YOU.

10 AND, YES, I KNOW YOU HAVE EXPERIENCED SELF-PUNISHMENT.
11 MOST PEOPLE WHO COMMIT CRIMES DO EXPERIENCE SELF-PUNISHMENT, BUT
12 THAT IS NOT WHAT SENTENCING IS FOR. SENTENCING IS NOT DESIGNED
13 TO SEE IF YOU HAVE PUNISHED YOURSELF BUT TO EXACT THAT WHICH THE
14 STATE BELIEVES IS AN APPROPRIATE SANCTION FOR YOUR CRIMINAL
15 CONDUCT. THAT'S WHAT SENTENCING IS FOR.

16 THE GUIDELINES WHICH APPLY TO THIS CASE DO INDEED
17 REFLECT THAT THE APPROPRIATE SENTENCE IS WITHIN THE RANGE OF 30
18 TO 37 MONTHS. OR IS IT 31 TO 37?

19 MR. ADDIS: I BELIEVE IT'S 31 TO 37, YOUR HONOR.

20 THE COURT: ALL RIGHT, 31 TO 37 MONTHS. BUT I HAVE
21 CONSIDERED THIS MATTER AND I BELIEVE, MR. BURNS, THAT THE
22 APPROPRIATE SENTENCE CAN ONLY BE EFFECTED IF THE COURT DEPARTS
23 FROM THE GUIDELINES. UNDER THE APPROPRIATE CIRCUMSTANCES, THE
24 COURT MAY DEPART FROM THE SENTENCE IMPOSED BY THE GUIDELINES.

ARTICLE 18 SECTION 3553(B) OF THE UNITED STATES CODE AUTHORIZES A

1 DEPARTURE FROM THE SENTENCING GUIDELINES WHEN THE COURT FINDS
2 THAT THERE EXISTS AN AGGRAVATING OR A MITIGATING CIRCUMSTANCE OF
3 A KIND OR TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION BY
4 THE SENTENCING COMMISSION IN FORMULATING THE GUIDELINES.

5 IN ITS POLICY STATEMENT, THE U.S. SENTENCING COMMISSION
6 STATES THAT, "THE PRESENCE OF FACTORS NOT ADEQUATELY CONSIDERED
7 IN THE GUIDELINES MAY, IN THE DISCRETION OF THE SENTENCING
8 JUDGE, WARRANT DEPARTURE FROM THE GUIDELINES. MOREOVER, THE
9 COURT MAY DEPART FROM THE GUIDELINES EVEN THOUGH THE REASON FOR
10 DEPARTURE IS LISTED ELSEWHERE IN THE GUIDELINES IF THE COURT
11 DETERMINES THAT IN LIGHT OF UNUSUAL CIRCUMSTANCES THE GUIDELINE
12 LEVEL ATTACHED TO THAT FACTOR IS INADEQUATE."

13 FURTHER, THE COMMISSION STATED THAT, AND I QUOTE, "THE
14 CONTROLLING DECISION AS TO WHETHER AND TO WHAT EXTENT DEPARTURE
15 IS WARRANTED CAN ONLY BE MADE BY THE COURT AT THE TIME OF
16 SENTENCING."

17 THUS, THE GUIDELINES EXPRESSLY AUTHORIZE THE SENTENCING
18 JUDGE TO CONSIDER CIRCUMSTANCES AT SENTENCING THAT MAY JUSTIFY
19 DEPARTURE FROM THE ESTABLISHED GUIDELINES.

20 I FIND AT LEAST THREE FACTORS THAT I BELIEVE ARE
21 INVOLVED IN YOUR OFFENSES WHICH I FEEL THE GUIDELINES EITHER
22 FAIL TO ADDRESS OR TO CONSIDER ADEQUATELY.

23 FIRST, I FIND THAT THE GUIDELINES, IN CONSIDERING THE
24 SEVERITY OF THE OFFENSES, DO NOT SUFFICIENTLY WEIGH THE DURATION
25 OF YOUR CRIMINAL CONDUCT. YOU HAVE PLED GUILTY TO AND THUS

1 CONFESSED TO THEFT FROM THE UNITED STATES GOVERNMENT FOR AT
2 LEAST SIX YEARS, FROM FEBRUARY 25, 1982, TO MAY 26, 1988. I
3 ADMIT THAT I RECOGNIZE THAT THE STATUTE OF LIMITATIONS IS ONLY
4 FIVE YEARS, ALL RIGHT.

5 THROUGHOUT THE COURSE OF THESE YEARS YOU CAUSED OVER 53
6 DIFFERENT FRAUDULENT CHECKS TO BE ISSUED BY THE UNITED STATES
7 GOVERNMENT.

8 WHILE THE GUIDELINES PERMIT ME TO CONSIDER THE LEVEL OF
9 PLANNING INVOLVED IN THE OFFENSE AND THE AMOUNT OF MONEY STOLEN,
10 I CANNOT IGNORE THE NUMBER OF YEARS AND THE AMOUNT OF FRAUDULENT
11 TRANSACTIONS PLANNED, SCHEMED AND EXECUTED BY YOU, AND I DO NOT
12 BELIEVE THAT THEY WERE CONSIDERED BY THE GUIDELINES OR, IF SO,
13 ADEQUATELY CONSIDERED.

14 I FIND IT SIGNIFICANT THAT YOU PERSISTED FOR OVER FIVE
15 YEARS IN PERPETRATING THIS CRIMINAL ACTIVITY AGAINST THE
16 TAXPAYERS OF THE UNITED STATES. THE FAILURE OF THE SENTENCING
17 GUIDELINES TO ACCOUNT FOR THIS, I BELIEVE, IS A GROUND FOR
18 DEPARTURE FROM THE GUIDELINES.

19 MOREOVER, WHILE THE GUIDELINES DO TAKE INTO
20 CONSIDERATION THE FACT THAT YOU VIOLATED THE PUBLIC TRUST IN
21 COMMITTING THESE CRIMES, THE COURT FINDS THAT THERE WAS MORE
22 INVOLVED IN YOUR ACTS OF THEFT AND FALSE CLAIMS THAN A MERE
23 VIOLATION OF PUBLIC DUTY. YOU ABUSED A PROCESS RELIED UPON BY
24 THE GOVERNMENT TO PAY THOSE WHO PERFORM IMPORTANT AND LEGITIMATE
25 SERVICES FOR THE UNITED STATES. IN TAKING ADVANTAGE OF THIS

1 VITAL SYSTEM OF REMUNERATION OVER SUCH A LENGTHY PERIOD OF TIME,
2 YOU HAVE DISRUPTED THE FUNCTIONS OF THE GOVERNMENT IN ADDITION
3 TO VIOLATING THE PUBLIC TRUST.

4 AS I EARLIER INDICATED, YOU ALSO TOTALLY VIOLATED YOUR
5 OATH OF EMPLOYMENT BY YOUR DEVIOUS CONDUCT OVER MANY YEARS. A
6 MILLION THREE COULD HAVE BEEN STOLEN AT ONE TIME, BUT IF A
7 MILLION THREE HAD BEEN STOLEN AT ONE TIME FROM A.I.D., IT WOULD
8 HAVE BEEN RECOGNIZED. YOU, IN YOUR DEVIOUS MANNER, STOLE AT A
9 RATE THAT MADE IT DIFFICULT FOR IT TO HAVE BEEN EASILY
10 ASCERTAINED.

11 THE SENTENCING GUIDELINES PERMIT DEPARTURE WHEN "THE
12 DEFENDANT'S CONDUCT RESULTED IN A SIGNIFICANT DISRUPTION OF A
13 GOVERNMENTAL FUNCTION, AND THE COURT MAY INCREASE THE SENTENCE
14 ABOVE THE AUTHORIZED GUIDELINE RANGE."

15 THE COURT FINDS THAT YOU CAUSED SIGNIFICANT
16 GOVERNMENTAL DISRUPTION BY STEALING GOVERNMENT FUNDS IN EXCESS
17 OF ONE MILLION DOLLARS AND BY WAY OF 53 SEPARATE FRAUDULENT
18 INSTRUMENTS.

19 FINALLY, THE GUIDELINES PERMIT THE COURT TO DEPART FROM
20 THE PRESCRIBED SENTENCE IF THE DEFENDANT COMMITTED THE OFFENSE
21 IN ORDER TO FACILITATE OR CONCEAL THE COMMISSION OF ANOTHER
22 OFFENSE.

23 IN THIS CASE, I REFER TO COUNT THREE IN WHICH YOU
24 FAILED TO REPORT THE STOLEN INCOME FOR CALENDAR YEARS 1982
25 THROUGH 1987, RESULTING IN A TAX OBLIGATION OF ALMOST HALF A

1 MILLION DOLLARS. BY CONTINUALLY EVADING THE PAYMENT OF YOUR
2 TAXES, YOU WERE ALSO ABLE TO CONCEAL CRIMES OF THEFT AND FALSE
3 CLAIMS. CERTAINLY, IF YOU HAD NOT CONCEALED THIS, YOUR CRIMES
4 WOULD HAVE BEEN DISCOVERED MUCH EARLIER.

5 FOR THESE REASONS, I FIND THAT SEVERAL IMPORTANT
6 ELEMENTS OF THE CRIMES COMMITTED BY YOU ARE NOT ADEQUATELY
7 CONSIDERED BY THE SENTENCING GUIDELINES, THUS WARRANTING A
8 DEPARTURE FROM ITS PRESCRIPTION.

9 THIS BEING THE CASE, THE COURT RELIES UPON ITS OWN
10 JUDGMENT AND EXPERIENCE AND FINDS THAT THE GUIDELINE RANGE FOR
11 THE OFFENSES WHICH YOU COMMITTED MUST BE DEPARTED FROM.

12 PURSUANT TO THE SENTENCING REFORM ACT OF 1984,
13 MR. BURNS, IT IS THE JUDGMENT OF THIS COURT THAT YOU SHALL BE
14 COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A TERM OF
15 60 MONTHS. UPON RELEASE FROM IMPRISONMENT, YOU SHALL BE PLACED
16 ON SUPERVISED RELEASE FOR A PERIOD OF THREE YEARS. THE
17 CONDITIONS OF SUPERVISED RELEASE WILL INCLUDE THE FOLLOWING:

18 THAT YOU ABIDE BY THE STANDARD CONDITIONS OF SUPERVISED
19 RELEASE RECOMMENDED BY THE SENTENCING COMMISSION, THAT YOU DO
20 NOT COMMIT ANOTHER FEDERAL, STATE OR LOCAL CRIME, THAT YOU PAY A
21 SPECIAL ASSESSMENT TO THE UNITED STATES OF 50 DOLLARS ON EACH OF
22 THE THREE COUNTS OF THE INFORMATION FOR A TOTAL OF 150 DOLLARS,
23 THAT YOU PROVIDE TO THE PROBATION OFFICER ACCESS TO ANY
24 REQUESTED FINANCIAL INFORMATION, AND THAT YOU CONTRIBUTE 200
25 HOURS OF COMMUNITY SERVICE -- I'M SORRY -- THAT YOU CONTRIBUTE

1 100 HOURS OF COMMUNITY SERVICE PER YEAR UPON YOUR RELEASE FROM
2 CONFINEMENT.

3 THE COURT FINDS THAT RESTITUTION HAS BEEN ACHIEVED
4 THROUGH THE PLEA -- IS IT CALLED A PLEA? IT'S NOT CALLED A PLEA
5 AGREEMENT.

6 MR. COLE: WE HAVE REFERRED TO IT IN THE OTHER
7 AGREEMENTS, YOUR HONOR, AS A PLEA AGREEMENT.

8 THE COURT: ALL RIGHT. IT'S A RESTITUTION AGREEMENT.

9 MR. COLE: SUBSEQUENT AGREEMENTS WOULD JUST BE AN
10 AGREEMENT.

11 THE COURT: ALL RIGHT. THE AGREEMENT OF RESTITUTION.
12 SO THE COURT WILL THEREFORE NOT ORDER ANY SPECIAL RESTITUTION.

13 THE COURT DOES FIND THAT BASED UPON THIS AGREEMENT THAT
14 YOU HAVE ENTERED INTO WITH THE GOVERNMENT THIS DATE THAT YOU
15 WILL PERHAPS NOT HAVE THE ABILITY TO PAY A FINE OF ANY TYPE
16 AFTER YOUR RELEASE, AND FOR THAT REASON THE COURT DOES NOT ORDER
17 YOU TO PAY A FINE. AND I WOULD ALSO SAY THAT BASED UPON THE
18 AGREEMENT THAT I READ TODAY THAT YOU WILL NOT HAVE THE ABILITY
19 TO PAY THE COST OF INCARCERATION, AND FOR THAT REASON THE COURT
20 WILL NOT ORDER YOU TO PAY FOR INCARCERATION. BECAUSE, HOWEVER,
21 YOU CANNOT PAY A FINE AND CANNOT PAY THE COST OF INCARCERATION,
22 THEREFORE, THE COURT IS ORDERING YOU TO CONTRIBUTE THESE HOURS
23 OF COMMUNITY SERVICE PER YEAR IN LIEU OF THE FINE PAYMENT, AND
24 IT IS SO ORDERED.

25 NOW, I WOULD LIKE YOU TO KNOW, MR. BURNS, THAT SINCE I

1 HAVE DEPARTED FROM THE SENTENCING GUIDELINES, YOU HAVE AN
2 ABSOLUTE RIGHT TO APPEAL YOUR SENTENCE, AND I AM SURE THAT
3 MR. ADDIS WILL ADVISE YOU AS I AM GOING TO ADVISE YOU NOW THAT
4 THE APPEAL MUST BE FILED WITHIN 10 DAYS OF TODAY'S DATE. IF YOU
5 NO LONGER HAVE THE FUNDS TO NOTE AN APPEAL OR TO RETAIN COUNSEL
6 FOR YOUR APPEAL, THE COURT OF APPEALS WILL PERMIT YOU TO FILE
7 WITHOUT PREPAYMENT OF COSTS, AND THE COURT OF APPEALS WILL
8 APPOINT COUNSEL TO REPRESENT YOU IF YOU ARE UNABLE TO RETAIN
9 COUNSEL OF YOUR OWN.

10 THE DEFENDANT WILL STEP BACK WITH THE MARSHAL.

11 MR. ADDIS: YOUR HONOR, MAY I BE HEARD BEFORE THE
12 DEFENDANT GOES?

13 THE COURT: CERTAINLY.

14 MR. ADDIS: YOUR HONOR, WE WOULD ASK THAT MR. BURNS BE
15 PERMITTED TO SURRENDER HIMSELF TO A PLACE OF INCARCERATION FOR
16 THE FOLLOWING REASONS:

17 FIRST OF ALL, THE GOVERNMENT HAS AGREED NOT TO OPPOSE
18 SUCH A REQUEST, BUT WE HAVE AFFIRMATIVE REASONS FOR REQUESTING
19 THAT. ONE, WE WOULD ASK THE COURT ULTIMATELY TO RECOMMEND TO
20 THE ATTORNEY GENERAL THE CAMP AT ALLENWOOD FOR THIS REASON:

21 MRS. BURNS, THE MOTHER OF THE TWO SMALL CHILDREN, HAS A
22 GRANDMOTHER WHO LIVES ABOUT 35 MINUTES FROM THE CAMP AT
23 ALLENWOOD. IF YOUR HONOR WERE TO RECOMMEND THE CAMP AT
24 ALLENWOOD, THEN MR. BURNS WOULD MOST LIKELY BE INCARCERATED
25 THERE AND MRS. BURNS COULD THEN VISIT HIM MUCH EASILY.

on Defense Intelligence Agency payroll account); United States v. Gibbs, 704 F.2d 464, 465 (9th Cir. 1983) (officer of federally-funded American Indian Assistance corporation used corporate funds to pay numerous personal expenses). Departure from the applicable guideline range is not warranted because an offense is serious, but only because it is unusual. See Guidelines, § 5K2.0. The adjustments for more than minimal planning provide adequate additional punishment for offenses involving numerous transactions and continuing over extended periods of time. Cf. United States v. Campbell, 878 F.2d 164, 165 (5th Cir. 1989) (vacating upward departure based on amount of money involved in offense, because factor adequately considered by guideline adjustment and "not unlike that which is ordinarily involved in a mail fraud conviction"). Because the duration of the offense was adequately considered by the Commission and was not unusual, the district court's reliance on it as a basis for departure was impermissible, and the sentence must therefore be vacated.

B. The District Court's Finding That The Offense Caused A Significant Disruption Of A Governmental Function Was Erroneous Because The Record Does Not Show That The Offense Resulted In Any Disruption Of AID's Functions Beyond That Which Is Inherent In The Offense, And The Departure From The Guidelines Was Therefore Impermissible.

A sentence outside the applicable guideline range is unreasonable if it is based on a factor that, although it was not adequately considered by the Sentencing Commission in formulating the guidelines, does not exist in the circumstances

of the particular case. See Diaz-Villafane, 874 F.2d at 49. Departure from the applicable guideline range is warranted "[i]f the defendant's conduct resulted in a significant disruption of a governmental function." Guidelines, § 5K2.7. Judge Johnson's finding that this factor warranted departure was erroneous because the record does not indicate that Burns' conduct caused any disruption in the agency's function beyond that which is inherent in any offense involving theft of government property and false claims.

In a case involving exportation of handguns, the Third Circuit noted that, because public safety is a prime consideration in any restriction on guns, a departure based on significant endangerment of "national security, public health, or safety," § 5K2.14, would be permissible only where danger to the public is "'present to a degree substantially in excess of that which ordinarily is involved in the offense of conviction[.]'" Id. (quoting § 5K2.0). The Commission's policy statement on disruption of a governmental function points out that interference which is "inherent in the offense" has been considered by the Commission, so that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." § 5K2.7. The district court noted that the reimbursement system Burns managed in his position with the agency is important because it is used by the government to remunerate vendors for services. (App. 32, 39). The importance of this function is undisputed, but there is no

indication beyond the district court's statements, *id.*, and the government's allegations at the sentencing hearing, (App. 28-29), that this function was adversely affected in any unusual way.

Burns' criminal conduct was unnoticed for a period of six to eight years, and was detected only after a routine security investigation not prompted by any suspicion of Burns. (App. 7). Only upon discovering the value of Burns' home, *id.*, and comparing it to the amount of his salary, *id.*, did officials begin to suspect Burns of diverting funds. *Id.* The record contains no evidence that the agency experienced any inability to meet its obligations or support its programs. The disruption of the agency's function was thus no more significant than that which is inherent in any offense involving theft of government property or false claims, and the guidelines "reflect the appropriate punishment[.]" § 5K2.9. Therefore, the departure was unreasonable, and the sentence must be vacated.

C. The Degree Of Departure, An Increase Of Over 50% From The Applicable Guideline Range, Is Unreasonable Because It Is Greater Than Necessary To Comply With The Purposes Of Punishment Endorsed By Congress And The Sentencing Commission.

A district court may not impose sentences that are "greater than necessary[] to comply with the purposes" of punishment endorsed by Congress in the Sentencing Reform Act of 1984. 18 U.S.C. § 3553(a). Those purposes include "the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to

lasted for an unusually long time. For this reason, the district court could properly conclude that the "more than minimal planning" specific offense characteristic did not adequately describe appellant's conduct. Accordingly, the district court did not err by departing based on this ground.

3. Appellant next claims (Br. 15-17) that the district court erroneously concluded that appellant's offense disrupted a government function. In appellant's view, the record reveals no disruption of AID's function beyond that which is inherent in the offense itself. Therefore, appellant argues, the district court could not depart on this ground either.

Guideline 5K2.7 allows a district court to depart from the guideline sentence "[i]f the defendant's conduct resulted in a significant disruption of a governmental function." The Commission's Policy Statement on departure, Guideline 5K2.0, explains that "disruption of a government function * * * would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice. When the offense of conviction is theft, however, and when the theft caused disruption of a government function, departure from the applicable guideline more readily would be appropriate" (emphasis added).

Here, several factors entered into the district court's conclusion that appellant had disrupted a government function within the meaning of Guideline 5K2.7. First, the court found that appellant's offenses involved "more * * * than a mere

violation of public duty. * * * [Appellant] abused a process relied upon by the government to pay those who perform important and legitimate services for the United States." App. 33, 39. The court stressed that appellant took "advantage of this vital system of remuneration over such a lengthy period of time." App. 32-33. In addition, the court thought it relevant in this respect that appellant had violated his oath of employment and "stole at a rate that made it difficult for [the thefts] to be easily ascertained." App. 33.

Under the lenient standard for departure set forth in Guideline 5K2.0, the court's findings more than suffice to justify its departure on this ground. The court's findings show that it determined that appellant's abuse of the processes for remunerating vendors at AID disrupted those processes.

Appellant's challenge to this conclusion misconstrues the meaning of the phrase "disruption of a government function." Appellant claims (Br. 16) that "the record does not indicate that [appellant's] conduct caused any disruption in the agency's function beyond that which is inherent in any offense involving theft of government property." Appellant looted an AID travel fund, however, by manipulating the AID procurement apparatus. The record shows that appellant used AID resources and manpower to accomplish his thefts, thus diverting those resources from other tasks. See App. 7 (forms used to divert funds prepared by clerk, then approved by appellant). Moreover, the checks to "Vincent Kaufman" were issued by the United States Treasury,

which presumably also has to devote time, resources, and manpower to issue a check. In short, appellant diverted the administrative apparatus of two federal departments to his own ends. This disruption of government function hardly compares to an ordinary theft of government property such as might be committed by an employee who steals an office machine.

Appellant also claims (Br. 17) that the government's failure to detect his theft over six years shows that it did not disrupt a government function. Appellant's skill at concealing his theft should not be rewarded, however. More importantly, the size of the federal government and the reach of its functions counsels against conditioning the application of Guideline 5K2.7 on whether a defendant's theft is detected. This is especially true where, as here, the theft caused measurable disruption and diversion of government resources.

In sum, appellant has not shown that the district court relied on impermissible factors to justify its upward departure from the Guidelines sentence. To the contrary, the record shows that the district court carefully considered the Guidelines in calculating appellant's sentence and decided that the Guidelines did not adequately evaluate appellant's behavior. Thus, the court did not err by departing from the Guidelines.⁷

⁷ For this reason, this Court need not consider appellant's contention (Br. 9 n.7) that if any of the factors relied on by the district court is impermissible, then the court's sentence must be vacated. We note, however, that the courts of appeals have not taken a unanimous view of this issue. Compare United States v. Rodriguez, No. 88-3604, slip op. at 16 (6th Cir., August 15, 1989) ("[w]hile one of the factors found in the

B. Nothing In The Record Suggests That Burns' Conduct Caused A Significant Disruption Of AID's Function; Therefore, The District Court's Departure On The Basis Of Guidelines § 5K2.7 Was Improper.

When a court of appeals determines that a district court relied upon a permissible ground for an upward departure, it should then decide whether the record provides a factual basis to support that ground in that particular case. See Brief of Appellant at 5-8; Joan, 883 F.2d at ___, 1989 U.S. App. Lexis at 10; Hernandez-Vasquez, 884 F.2d at ___, 1989 U.S. App. Lexis at 2 (where causing a high speed chase was proper reason for departure, but defendant was not car's driver and evidence did not show that he was responsible, departure on that ground was improper). Where a defendant's conduct results in significant disruption of governmental function, the district court may "increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected." Guidelines § 5K2.7. While the Government rightly notes that the level of disruption required to trigger an upward departure may be less in theft cases than in cases of bribery or obstruction of justice, Guidelines § 5K2.0 and Brief of Appellee at 18, the record must nonetheless reflect that the theft has caused some discernable level of disruption. The district judge, however, made no

flies directly in the face of the Guidelines policy which states that courts should rarely depart. Guidelines § 1A4(b), para. 3 ("despite courts' legal freedom to depart from the guidelines, they will not do so very often").

reference to the nature or extent of any disruption, and, moreover, she identified no governmental function that Burns' conduct disrupted. The Government indicates that language in the sentencing order supports the judge's finding that significant governmental disruption existed in this case, Brief of Appellee at 18-19, but the district judge referred to no factors having any relationship to a disruption of governmental function.¹¹

The function of AID is carrying "out bilateral development assistance programs."¹² In addition, the agency also "supports the overseas humanitarian relief and development programs of U.S. private and voluntary organizations and assists development-related research in U.S. Universities."¹³ Nothing in the record indicates that Burns' conduct disrupted this function in any way. Indeed, the Government acknowledges that the funds Burns diverted were from an "unused" travel fund. Brief of Appellee at 2.

If significant disruption of government function exists in this case, the standard for an upward departure on those grounds will be such that any theft from the government will require an

¹¹ See Brief of Appellee at 18-19: "[t]he court found that [Burns'] offenses involved 'more * * * than a mere violation of public duty. * * * [he] abused a process relied upon by the government to pay those who perform important and legitimate services for the United States.'" Judge Johnson also stated that "[t]he Court finds that [Burns] caused significant governmental disruption by stealing government funds in excess of one million dollars, over a six year period, and by way of fifty-three separate fraudulent instruments." (App. at 40); see also (App. at 33).

¹² OMB, Budget of the United States Government, 5-20 (FY 1987).

¹³ Id.

upward departure from the applicable guideline range. Indeed, the level of disruption the Government has established in this case is comparable to that caused by their hypothetical office machine stealing employee. See Brief of Appellee at 20. While the record reveals that Burns used a clerk to fill out travel vouchers for him, diversion of the clerk's clerical time did not affect the AID's function. Even the time required for a clerk to fill out a form 53 times over six years could not significantly disrupt AID.¹⁴

During the fiscal years 1983-85, the budget for AID was just under \$2,000,000,000. OMB, Budget of the United States Government, 5-21 (FY 1984). The budget during fiscal years 1986-88 was just over \$2,000,000,000, OMB, Budget of the United States Government, 5-19 (FY 1987), resulting in a total budget of nearly 12,000,000,000 over six years. An unnoticed theft of \$1,200,000 over six years, representing a mere .001% of AID's budget, could not significantly disrupt a \$12,000,000,000 agency.¹⁵

C. The Extent Of The District Court's Departure Was Improper Because The Sentence Is Greater Than Necessary To Comply With The Purposes Of Sentencing And Because The Reasons For The Departure Do Not Justify Its Length.

A Court of Appeals must determine, as part of its review of

¹⁴ Neither could the printing of 53 checks over six years significantly disrupt the U.S. Treasury's function of printing checks for the federal government.

¹⁵ The Government argues that Burns should not be "rewarded" for the government's failure to detect his crime. Brief of Appellee at 20. However, Burns' argument is certainly not founded on a request to be rewarded for his offenses. Rather, he simply asks that he not receive any unauthorized extra punishment.

broad discretion of a sentencing court in evaluating the length of the sentence, could the defendant's "right to appeal the district court's departure . . . afford[] the same opportunity to challenge the grounds for departure," Brief of Appellee at 26, that was lost in the district court.

Factual disputes remain unresolved here on appeal because the district court did not follow any procedure designed to air and resolve disputes at that level.²⁰ Such a procedure may add several steps to the pre-sentencing process, such as the court providing to counsel notice of intent and reasons to depart prior to the sentencing hearing, counsel having an opportunity to respond, and the court making findings on disputed issues.²¹ However, in terms of judicial economy, any "cumbersome," see Brief of Appellee at 25, nature of these proceedings pales in comparison to the inefficiency of unnecessary appellate review and potential remands for resolution of disputed factors.

CONCLUSION

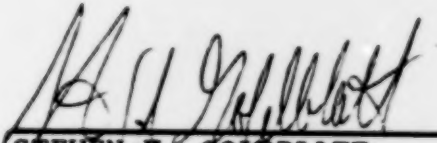
For the foregoing reasons, Mr. Burns respectfully requests that this Court vacate his sentence and remand this case to the district court with instructions either to resentence him within the applicable Guideline range of 30-37 months, or to resentence him after conducting evidentiary proceedings consistent with Fed. R. Crim. P. 32(a) and § 6A1.3 of the Sentencing Guidelines.

²⁰ Contrary to the Government's assertion, Burns' sentence does not rest on undisputed facts. See Brief of Appellant at 15-17; Brief of Appellee at 18-20; infra at pp. 10-12.

²¹ These procedures all accord with Guidelines §§ 6A1.1-6A1.3.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing petition for certiorari, filed on behalf of Petitioner William J. Burns was mailed, postage prepaid, to: Kenneth W. Starr, Esquire, Solicitor General of the United States, Department of Justice, 10th Street and Constitution Avenue, N.W., Room 5143, Washington, D.C. 20530 on this 19th day of April, 1990.


STEVEN H. GOLDBLATT

